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No. 90-681-CFX  
Status: GRANTED

Title: Barbara Hafer, Petitioner  
v.  
James C. Melo, Jr., et al.

Docketed:  
October 26, 1990

Court: United States Court of Appeals  
for the Third Circuit

Counsel for petitioner: Richter, Jerome R.

Counsel for respondent: Rubenstone, Edward H.

Entry	Date	Note	Proceedings and Orders
1	Oct 26 1990	G	Petition for writ of certiorari filed.
2	Nov 28 1990		DISTRIBUTED. January 4, 1991
3	Jan 2 1991	F	Response requested -- BRW, HAB, AS.
4	Feb 1 1991		Brief of respondents James C. Melo, Jr., et al. in opposition filed.
5	Feb 6 1991		REDISTRIBUTED. February 22, 1991
6	Feb 6 1991	X	Reply brief of petitioner Barbara Hafer filed.
7	Feb 25 1991		Petition GRANTED. *****
8	Apr 11 1991		Joint appendix filed.
9	Apr 11 1991	G	Motion of National Association of Counties, et al. for leave to file a brief as amici curiae filed.
11	Apr 11 1991		Brief of petitioner Barbara Hafer filed.
10	Apr 22 1991		Motion of National Association of Counties, et al. for leave to file a brief as amici curiae GRANTED.
15	May 2 1991	G	Motion of Nancy Haberstroh for leave to file a brief as amicus curiae filed.
13	May 8 1991		Order extending time to file brief of respondent on the merits until May 29, 1991.
14	May 14 1991	G	Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae filed.
17	May 22 1991		Lodging received. (10 copies)
18	May 24 1991		Brief of respondents James C. Melo, Jr., et al. filed.
16	May 28 1991		Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae GRANTED.
20	May 29 1991	G	Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae filed.
21	May 29 1991	G	Motion of Kenneth W. Fultz for leave to file a brief as amicus curiae filed.
19	Jun 3 1991		Motion of Nancy Haberstroh for leave to file a brief as amicus curiae GRANTED.
22	Jun 17 1991		Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae GRANTED.
23	Jun 17 1991		Motion of Kenneth W. Fultz for leave to file a brief as amicus curiae GRANTED.
24	Jun 24 1991	G	Application (A90-980) to extend the time to file a reply brief from June 27, 1991 to July 26, 1991, submitted to Justice Souter.
25	Jun 26 1991		Application (A90-980) granted by Justice Souter extending the time to file until July 26, 1991.

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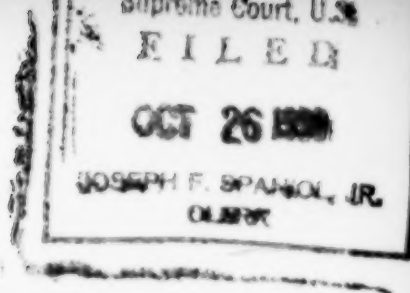
No. 90-681-CFX

Entry	Date	Note	Proceedings and Orders
26	Jul 12 1991		CIRCULATED.
27	Jul 19 1991		SET FOR ARGUMENT TUESDAY, OCTOBER 15, 1991. (4TH CASE)
28	Jul 26 1991	X Reply	brief of petitioner Barbara Hafer filed.
29	Jul 26 1991		Certified copy of Court of Appeals proceedings received.
30	Aug 5 1991		Certified copy of original record, except document 2, received. (box)
31	Sep 13 1991	X Supplemental	brief of petitioner Barbara Hafer filed.
32	Oct 15 1991		ARGUED.



①  
90-681

No. \_\_\_\_\_



IN THE  
**SUPREME COURT OF THE UNITED STATES**

\_\_\_\_\_  
OCTOBER TERM, 1990  
\_\_\_\_\_

BARBARA HAFFER,

*Petitioner*

*v.*

JAMES C. MELO, JR. AND CARL GURLEY, ET AL.,

*Respondents*

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**  
\_\_\_\_\_

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## QUESTIONS PRESENTED

1. Is the Auditor General of Pennsylvania, acting within her official capacity in connection with the discharge of employees, not a "person" under the Civil Rights Act, 42 U.S.C. §1983, and therefore not subject to civil damage actions instituted under that statute on behalf of former employees of the Pennsylvania Department of the Auditor General arising out of the Auditor General's termination of their employments?

2. Is not the Auditor General of Pennsylvania, acting within her official capacity in connection with the discharge of employees, entitled to the absolute immunity of the Eleventh Amendment to the Constitution of the United States from civil damage actions in the federal courts instituted on behalf of former employees of the Pennsylvania Department of Auditor General arising out of the Auditor General's termination of their employments?

## LIST OF PARTIES

The proceedings in the United States Court of Appeals for the Third Circuit involved two separate appeals from a single order of the United States District Court for the Eastern District of Pennsylvania which were docketed in the Court of Appeals at 89-1924 and 89-1925. The parties herein who participated in the appeal at 89-1924 included petitioner Barbara Hafer and respondents James C. Melo, Jr., Louise Jurik, Donald Ruggerio, Karol Danowitz, James Dicosimo, Lucille Russell, Walter W. Speelman and John Weikel (Melo respondents). The parties to the appeal at 89-1925 were petitioner Barbara Hafer and respondents Carl Gurley, W. Gerard Best, Michael Brennan, Margaret Casper, Elizabeth Buchmiller, Daniel Clemson, Mary Fager and George A. Franklin, Jr. (Gurley respondents).

James J. West, United States Attorney for the Middle District of Pennsylvania, was a co-appellee with petitioner in the appeal at No. 89-1924. The questions presented herein by the petitioner do not relate to the claims asserted against Mr. West nor to his defenses thereto and James J. West has not been named as a party herein.

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No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

BARBARA HAFER,

*Petitioner*

v.

JAMES C. MELO, JR. AND CARL GURLEY, ET AL.,

*Respondents*

**PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

The petitioner, Barbara Hafer, Auditor General of the Commonwealth of Pennsylvania, respectfully requests that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit, entered in the above captioned proceeding on August 21, 1990.

**OPINIONS BELOW**

The Opinion of the United States Court of Appeals for the Third Circuit has been reported at 912 F.2d 628, and is reprinted in the Appendix hereto at p. A-1, *infra*. The Memorandum Opinion of the United States District Court for the Eastern District of Pennsylvania has not been reported. It is reprinted in the Appendix hereto, p. A-36, *infra*.



## JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, vacating the order dated September 28, 1989, of the United States District Court for the Eastern District of Pennsylvania granting summary judgment in favor of petitioner was entered on August 21, 1990. Petitioner's timely petition to the Court of Appeals for a rehearing before the entire court in banc was dismissed on September 21, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## STATUTES INVOLVED

Constitution of the United States, 11th Amendment.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

42 U.S.C. §1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

The proceedings in the Court of Appeals arose out of two sets of actions (consisting of eleven separate cases) instituted in the United States District Court for the Eastern District of

Pennsylvania by sixteen former employees of the Department of the Auditor General of the Commonwealth of Pennsylvania (Department), alleging violations of their civil rights as a result of their having been discharged by petitioner upon her assuming the office of Auditor General in January 1989. Jurisdiction in all of the actions was based on 42 U.S.C. §§1983, 1988 and 28 U.S.C. §1343.

Eight of the lawsuits, consolidated in the District Court under the caption *Melo, et al. v. Hafer and West*, involve claims by eight individuals whose employments were terminated by petitioner because of their implication in a job-selling scheme uncovered by the United States Attorney for the Middle District, James J. West ("West"). The Melo respondents have asserted claims against Hafer and West under 42 U.S.C. §1983 for deprivation of the rights of due process and free speech and a conspiracy to deprive them of these rights, and separate state law claims against West alone. The only relief sought by the Melo respondents is monetary; none of the Melo respondents sought to be reinstated in their former positions.

The second group of actions involve an additional eight individuals who were terminated as part of a management overhaul of the Department. These actions were also consolidated in the District Court under the caption *Gurley, et al. v. Hafer*. The Gurley respondents allege claims against petitioner only for deprivation of due process and freedom of speech.

Two of the Gurley respondents seek only damages. Six of the Gurley respondents, who joined in one complaint, also request reinstatement to their former positions. Their complaint expressly alleges that they claim reinstatement relief from petitioner in her "official capacity" and damages from petitioner in her "personal capacity".

Petitioner answered the complaints, raising a number of legal defenses, including in particular the defense that the actions were barred by the Eleventh Amendment to the United States Constitution ("Eleventh Amendment"). These defenses were for the most part applicable to both groups of actions and

were presented to the District Court by way of a consolidated Motion for Summary Judgment.<sup>1</sup>

The District Court entered an Order (A-35) and Memorandum Opinion (A-36), granting petitioner's Motion for Summary Judgment and dismissing both the Melo and Gurley actions.<sup>2</sup> The principal basis for the District Court's opinion was that petitioner's actions in discharging the respondents were effected in her *official* capacity as Auditor General of Pennsylvania and that she was not a "person" subject to the provisions of 42 U.S.C. §1983, relying on the recent opinion of this Court in *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304 (1989) (A-37-A-40).<sup>3</sup>

Separate appeals were taken from the District Court's Order by the Melo respondents and the Gurley respondents, which appeals were consolidated for argument before the Court of Appeals. The appeals were argued before a panel consisting of Judges Sloviter, Becker and Stapleton on March 16, 1990. On August 21, 1990, the Court of Appeals filed an Opinion (A-1) vacating the order of the District Court dismissing the claims against petitioner.<sup>4</sup>

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1. In the Melo action, West also filed a Motion To Dismiss the Complaint or in the Alternative for Summary Judgment and the United States of America filed a motion to be substituted in place of West as to the state law counts.

2. The Order dismissing the Melo action was applicable to both petitioner and West and the District Court denied West's Motion to Dismiss on the grounds of mootness. The District Court did, however, grant the motion of the United States to be substituted as defendant with respect to the state law counts of the Melo complaint and dismissed those counts on the ground that West's conduct in connection with these counts was certified by the United States to have been within the scope of his employment necessitating substitution, 28 U.S.C. §2679(b)(1), and that the United States had not waived its defense of sovereign immunity with respect to the state claims asserted therein, 28 U.S.C. §2680(h).

3. Although petitioner submitted an extensive appendix of exhibits addressed to the merits of respondents' substantive claims, the District Court, in view of its decision that 42 U.S.C. §1983 was inapplicable, did not make any determination as to these issues.

4. The Court further vacated the District Court's dismissal of the state law claims as to West and remanded for evaluation by the District Court of the

The principal basis for the Court's reversal of the District Court's grant of summary judgment in favor of petitioner as to *all* of the respondents is that one of the complaints, joined in by *only six* of the eight Gurley respondents, expressly asserted claims for monetary damages against petitioner in her "personal capacity" and that state officials *sued* in their personal capacities are subject to liability for damages<sup>5</sup> under 42 U.S.C. §1983 and are not entitled to the immunity afforded by the Eleventh Amendment. In so holding, the Court of Appeals has rendered a decision as to the scope and intent of these federal laws which is contrary to the express interpretation placed on them by this Court in *Will v. Michigan Dept. of State Police*, *supra*, which is in conflict with decisions of the United States Courts of Appeal for the Sixth and Seventh Circuits, and which presents an important issue regarding liability of state officers under federal law.

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United States' certification that West's conduct was within the scope of his employment. The dismissal of the civil rights action against West was affirmed, however, on the ground that the civil rights conspiracy alleged by the Melo employees, which occurred prior to petitioner being elected Auditor General of Pennsylvania, was insufficient to impose liability against West, a non-state actor, under 42 U.S.C. §1983.

5. The Court also held that the District Court erred in dismissing the combined complaint of the six Gurley respondents who also sought reinstatement on the ground that state officers may be sued under 42 U.S.C. §1983 in their official capacities for prospective relief. Because of the obvious inconsistency involved in asserting claims against a state officer in both capacities, "official" and "personal", the six Gurley respondents seeking reimbursement have not emphasized the differences in their legal position from that of the other respondents, but have joined in the respondents' principal argument that their action was against Hafer in her personal, not official, capacity.



## REASONS FOR GRANTING A HEARING

### I. The Decision of the Court of Appeals That Petitioner Is Subject to Liability for Damages Under 42 U.S.C. §1983 for Acts Taken in Her Official Capacity Is Directly Contrary to the Decision of this Court in *Will v. Michigan Dept. of State Police* and Is in Conflict With Decisions of Other United States Courts of Appeal.

It is undisputed that, absent waiver by the State or congressional abrogation, the Eleventh Amendment bars a damage action against a State in federal court. *Kentucky v. Graham*, 473 U.S. 159, 169, 105 S.Ct. 3099, 3107 (1985). The Amendment also bars damage suits against a state official in his or her official capacity because "a judgment against a public servant in his official capacity imposes liability on the entity that he represents." *Id.* quoting *Brandon v. Holt*, 469 U.S. 464, 471, 105 S.Ct. 873, 878 (1985). Moreover, this Court, in a recent decision, has further held that a State or a state official, *acting* in that person's official capacity, cannot be sued in any court for damages under 42 U.S.C. §1983, because they are not "persons" subject to liability under the statute. *Will v. Michigan Dept. of State Police*, *supra*.<sup>6</sup>

The Court of Appeals narrowly construed these constitutional and statutory restrictions upon civil rights damage actions as barring suits against a state official *only* if the plaintiff expressly alleges that the official is being sued in his or her "official capacity." According to the Court of Appeals, a civil rights damage action may be maintained against a state official where the plaintiff asserts, either in the complaint or otherwise, that the official is being sued in his "personal capacity," *even though the conduct giving rise to the action was performed, and could only be performed, in the individual's official capacity.*

6. A state official may, however, be subject to liability for damages for acts committed in his personal capacity, *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 3105 (1985), and is subject to an action against him in his official capacity to secure prospective relief from alleged violation of rights protected by federal law, *id.*, 473 U.S. at 167 n. 14, 105 S.Ct. at 3106 n. 14; *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304, 2311-12 n. 10 (1989).

This restrictive interpretation of the protection afforded to state officers under our constitutional dichotomy of government sets forth a standard of State liability which is diametrically opposed to the express language in this Court's most recent discussion of this issue in *Will*.

In *Will*, a state employee brought an action under 42 U.S.C. §1983 in the Michigan state courts against the Michigan State Department of State Police and its director, alleging that he had been denied a promotion for an improper reason in violation of his civil rights. The Eleventh Amendment does not bar actions instituted in the state courts and at the time there was a conflict in the federal and state courts as to susceptibility of States and state officers to a damage action under 42 U.S.C. §1983 in the state courts. The Michigan Supreme Court held that neither the State, acting through its Department of Police, nor the Director of State Police, acting in his official capacity, were "persons" under §1983, and they were therefore not subject to liability for damages under that statute in the state courts.

That decision was affirmed by this Court as to both the State and the Director of State Police. In extending its ruling to the Director, this Court stated as follows (109 S.Ct. at 2311-12):

"Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. . . . As such, it is no different from a suit against the State itself. . . . We see no reason to adopt a different rule in the present context, *particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device.*

"We hold that neither a State nor its officials *acting in their official capacities* are 'persons' under §1983. This judgment of the Michigan Supreme Court is affirmed." (Citations and footnotes omitted; emphasis added.)

It is obvious that this determination is equally applicable to bar a damage suit against a state official in the federal courts as well as in the state courts. In concluding that 42 U.S.C. §1983

does not authorize actions against States in state courts, the Court was largely influenced by the limitations upon such actions in the federal courts imposed by the Eleventh Amendment. Moreover, the Court's construction of the statutory term "persons" to exclude state officials *acting* in their official capacities cannot be limited to use of the statute to commence civil rights actions in state courts and must be applied with equal effect to civil rights actions commenced in the federal courts.

It is equally clear from the Court's use of the term "acting in their official capacities," rather than "sued in their official capacities," that the Court has adopted the position taken by a number of federal courts prior to *Will* that the Eleventh Amendment precludes the maintenance of a damage action against a state official under 42 U.S.C. §1983 where the alleged misconduct is based upon acts taken within the performance and scope of the official's duties, even though the plaintiff has alleged that the action is against the official in his "personal capacity." *Kolar v. County of Sangamon*, 756 F.2d 564, 568 (7th Cir. 1985); *Beehler v. Jeffes*, 664 F.Supp. 931, 943 n. 20 (M.D. Pa. 1986); *Lewis v. Kelchner*, 658 F.Supp. 358, 361-62 (M.D. Pa. 1986).<sup>7</sup> In other words, it is the action itself which has been taken that is important to the determination whether an action is against the individual in his "official" or "personal" capacity, not the plaintiff's characterization of that capacity.

That this is the effect of the Court's decision in *Will* has already been recognized by the Court of Appeals for the Sixth Circuit in *Rice v. Ohio Dept. of Transportation*, 887 F.2d 716 (6th Cir. 1989). *Rice* involved an action under 42 U.S.C. §1983 by a state employee against his departmental employer, the State Department of Transportation, and the director and

7. See also *Rodriguez v. James*, 823 F.2d 8 (2d Cir. 1987); *Jones v. Smith*, 784 F.2d 149 (2d Cir. 1986), which dealt with the question from a slightly different approach by considering a suit to have been brought against a state official in his official capacity, notwithstanding the averments of "personal" capacity, because the alleged unlawful acts were performed pursuant to a state policy. But see, e.g., *Farid v. Smith*, 850 F.2d 917 (2d Cir. 1988), which relied solely on the allegations of the complaint in determining whether or not a suit was an official or personal capacity action.

deputy director thereof, for damages incurred as a result of plaintiff's being passed over for promotion for alleged improper reasons. In affirming the grant of summary judgment in favor of defendants, the Sixth Circuit held that the state officials, having *acted* in their official capacities in connection with plaintiff's promotion, were not "persons" subject to liability under 42 U.S.C. §1983, notwithstanding plaintiff's allegation of "personal capacity"<sup>8</sup> (887 F.2d at 718-19):

"Insofar as the director and deputy director were acting in their official capacities, it is now clear that they, like the state itself, were not 'persons' within the meaning of §1983 [quoting *Will*] . . . .

Although the complaint filed by Mr. Rice alleges at one point that the individual defendants were acting both 'in their official and personal capacities' the record does not suggest in any way that the defendants' actions were somehow unofficial. *The capacity in which the individual defendants were in fact acting is what matters, not the capacity in which they were sued*; congressional intent is not to be circumvented *Will* says 'by a mere pleading device' .... (Emphasis added.)

There is no question in the instant matter that Hafer was acting in her official capacity in discharging the respondents.

8. See also *Cowan v. University of Louisville School of Medicine*, 900 F.2d 936 (6th Cir. 1990) (action by former medical student against state medical school officials for alleged wrongful dismissal); *AFSCME v. Tristano*, 898 F.2d 1302 (7th Cir. 1990) (action by state employees against state officials for implementing an employee drug abuse program under color of state authority). But see, *Stem v. Ahearn*, 908 F.2d 1 (5th Cir. 1990) (action by father against state child protective services workers for alleged wrongful initiation of child molestation charges); *Dube v. State University of N.Y.*, 900 F.2d 587 (2d Cir. 1990) (action by professor against state university officials for alleged wrongful denial of tenure); *Santiago v. Lane*, 894 F.2d 218 (7th Cir. 1990) (action by prisoner against state prison officials arising out of attacks on him by other prisoners); *Wells v. Brown*, 891 F.2d 591 (6th Cir. 1990) (action by prisoners against state prison officials for alleged wrongful transfer within prison system); *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989) (action by state employee against director of state agency for alleged wrongful discharge).



The Court of Appeals expressly acknowledged "Hafer, the head of the Department . . . is vested under state law with authority to hire and fire employees in the Department. . . ." (A-17 n 8). A fuller discussion of the nature of petitioner's acts is set forth in the opinion of the District Court (A-40):

Hafer's removal of plaintiffs from their positions occurred in her role as Auditor General, a constitutional officer under the Pennsylvania Constitution. Pa. Const. art. IV, §18. Although Hafer, as Auditor General, directed the firings, plaintiffs were employees of the Commonwealth, not of Hafer. Their grievances are directed against the impact of the Commonwealth's termination of their employment. *Hafer's power to cause the terminations derived solely from her authority as a state official. Had Hafer been acting in a personal capacity, she would not have been empowered to effectuate the discharges. . . .* If Hafer had not been elected, or if she had not fired plaintiffs, there would not have been a basis for these §1983 causes of action. (Emphasis added; footnote omitted).

The Court of Appeal's reliance upon the allegations of six of the sixteen respondents that they are suing Hafer in her "personal", rather than "official" capacity<sup>9</sup> and refusal to accept the plain language of this Court is based upon an analysis that all acts by a state official "under color of state law" are within the authority of the official's position and the official is subject to liability under 42 U.S.C. §1983 for abuse of that authority (A-17). The defect in this reasoning is that it fails to recognize a distinction between acts of state officials under color of state law which are *outside* of the official's authority or which are not essential to the operation of the state government, and acts of state officials which are both *within the official's authority and necessary to the performance of the State's governmental functions*, such as the hiring and firing of employees. These latter

9. Contrary to the admonition of Will that the immunity of a state official from liability for damages for acts performed in their official capacity should not be circumvented by a mere pleading device.

acts are simply acts of the State which are not subject to damage liability under 42 U.S.C. §1983 by reason of the Eleventh Amendment, as well as this Court's interpretation of that statute in *Will*.

In all events, this Court should review the Court of Appeals's apparent disregard of the express language in *Will* and resolve the conflict in the decisions of the Courts of Appeal which now exist with regard to the determination whether a civil rights damage suit is an official or personal capacity action.

## II. The Decision of the Court of Appeals That Petitioner Is Subject to Liability for Damages Under 42 U.S.C. §1983 for Exercising Her Responsibility Under State Law To Hire and Fire Employees of the Department of Auditor General Presents an Important Question of Federal Law Which Should Be Settled by This Court.

The Court's decision that petitioner is liable for damages for exercising her official duties in hiring and discharging employees is not only contrary to *Will*, it also contravenes one of the principal purposes of the Eleventh Amendment, i.e., to preserve the sovereignty of the States by restricting the exercise of federal judicial power over the States and state officials. *Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare*, 411 U.S. 279, 287, 293-94, 93 S.Ct. 1614, 1619, 1622-23 (1973) (Marshall, J., Concurring). These considerations of federalism are particularly critical in matters, such as the instant one, arising out of acts taken in the operation of the State's governmental affairs. Certainly the hiring and firing of employees is an integral part of the operation of a state government and that function can only be performed by the elected and appointed state officials responsible for those functions.

An exception to the proscription of the Eleventh Amendment permitting imposition of personal damage liability against state officials for exercising, on behalf of the State, their official functions in this respect would have a chilling effect upon their good faith efforts to maintain the high standards of employment



practices necessary for efficient management and would interfere with the operation of the state governments.

At the very least, the decision of the Court of Appeals involves an important issue as to the extent of state officials' immunity from federal damage actions in general and as applied to a suit arising out of the firing of employees in particular which should be resolved by this Court.

### CONCLUSION

For the reasons specified above, a writ of certiorari should be issued to the United States Court of Appeals for the Third Circuit in the within matter.

Respectfully submitted,

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Filed August 21, 1990

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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NO. 89-1924

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JAMES C. MELO, JR.  
LOUISE JURIK  
DONALD RUGGERIO  
KAROL DANOWITZ  
JAMES DICOSIMO  
LUCILLE RUSSELL  
WALTER W. SPEELMAN  
JOHN WEIKEL,

*Appellants*

v.

BARBARA HAFFER and JAMES J. WEST

---

NO. 89-1925

---

CARL GURLEY  
W. GERARD BEST  
MICHAEL BRENNAN  
MARGARET CASPER  
ELIZABETH BUCHMILLER  
DANIEL CLEMSON  
MARY FAGER  
GEORGE A. FRANKLIN, JR.

*Appellants*

v.

BARBARA HAFFER

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Appeals from the United States District Court  
for the Eastern District of Pennsylvania  
(D.C. Civil Nos. 89-2935 & 89-2685)

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Argued March 16, 1990

Before: SLOVITER, BECKER and STAPLETON,  
*Circuit Judges*

(Filed: August 21, 1990)

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**OPINION OF THE COURT**

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SLOVITER, *Circuit Judge*.

I.

*Introduction*

This is an appeal from the district court's dismissal of two civil rights actions. In the action with Carl Gurley as the lead plaintiff, eight terminated employees assert a claim under 42 U.S.C. § 1983 alleging that their discharge by Barbara Hafer, the Auditor General of Pennsylvania, was political and therefore violated their due process and First Amendment rights. In the action with James C. Melo as the lead plaintiff, eight other terminated employees, who similarly allege a violation of their civil rights by Hafer, further allege that Hafer and James West, the acting United States Attorney for the Middle District of Pennsylvania, conspired to deprive them of their civil rights. The Melo plaintiffs also assert state law claims against West.

This appeal requires us to consider whether a claim for monetary relief brought under 42 U.S.C. § 1983 may be maintained against a state official in her individual capacity, whether a claim under the same statute may be maintained against a



federal official when he is alleged to have conspired with a candidate for state office, and whether a scope of employment certification issued by the government in a claim brought under the Federal Tort Claims Act is reviewable.

## II.

### *Facts and Procedural History*

The eight plaintiffs whose complaints were consolidated into the Melo action allege that they were employed in various capacities through January 1989 in the Pennsylvania Auditor General's Office, during which time they had compiled satisfactory work records. The complaints allege that sometime after John Kerr, a former employee in the Auditor General's Office, admitted that he received payments to influence either hiring or promotion decisions for 21 employees in the Auditor General's Office, acting United States Attorney West provided a list of the 21 employees to Donald Bailey, the then-Auditor General, in a confidential letter dated on or about January 21, 1988. The letter stated that "[w]e can express no opinion on whether these listed individuals knew of the purchase of their job" and it contained the request "that you keep these names strictly confidential, not use them for any type of media disclosures other than necessary to appropriate administrative proceedings, and make them available only to your most trusted employees on a need-to-know basis." Melo App. at 11. Bailey subsequently conducted an investigation of the 21 employees through his Chief Counsel, James L. McAneny, and McAneny concluded that the Melo plaintiffs committed no wrongdoing nor were they aware of any wrongdoing committed on their behalf.

On or about April 30, 1988, Hafer was nominated as the Republican candidate for Auditor General and Bailey, the incumbent, was nominated as the Democratic candidate. The complaints allege that the Melo plaintiffs were registered Democrats and West was a registered Republican. They allege that during the election campaign between Hafer and Bailey, West provided Hafer with a copy of the letter he sent to Bailey and advised Hafer that the 21 employees on the list "bought their jobs"; that West was "motivated by a desire to assist [Hafer] in the November, 1988 election and to create and/or foster a campaign issue that favored Ms. Hafer"; and that West provided the list with "a knowledge, understanding and expectation that . . . Ms. Hafer, if elected, would fire all of the people on the list." Melo App. at 13. Hafer allegedly stated on numerous occasions during the campaign that she received the "jobs-bought" list from West and that, if elected, she would fire all employees on the list.

Hafer was elected as Auditor General in November 1988. According to the complaints, on February 1, 1989, Hafer, without conducting any additional investigation to determine the alleged involvement of the Melo plaintiffs in the job-buying scheme, fired 18 employees whose names appeared on the "jobs bought" list, including all eight Melo plaintiffs. In her letters terminating the Melo plaintiffs' employment, Hafer stated that the dismissal was "necessary based on information gathered by my office as well as through cooperation with other governmental agencies as a result of an investigation of your involvement in a job buying and/or a job promotion scheme in the Auditor General's Office." Melo App. at 14. The Melo plaintiffs allege that Hafer did not follow the



provisions in the Auditor General's Policy and Procedure Manual, in effect since on or about January 1986, which includes procedural protections and a "just cause" requirement for dismissals.

The complaints also allege that an article in the February 2, 1989 edition of the Patriot-Capital News quoted both Hafer, as stating that she was firing 18 employees who had paid "up to \$5,000 each for their jobs under a previous administration," and West, as stating that "he appreciated Ms. Hafer's definitive action in firing the eighteen employees."

The factual allegations and legal claims against Hafer alleged by the Gurley plaintiffs are similar to those made by the Melo plaintiffs. The Gurley plaintiffs allege that they had been continuously employed at the Auditor General's Office in various capacities until February 21, 1989 and had performed their work satisfactorily; that all but one of them were registered Democrats; that all had been supporters of Bailey in the November 1988 election for Auditor General; and that on February 21, 1989, Hafer discharged them without explanation. Unlike the Melo plaintiffs, they have not sued West and make no allegations as to him.

The claims made by the plaintiffs under 42 U.S.C. § 1983 are that their firing by Hafer deprived them of their right to procedural and substantive due process and interfered with their First Amendment freedom of political association. The Melo plaintiffs also allege that Hafer and West engaged in a conspiracy to deprive them of due process and equal protection of the law, and they include the state law claims against West of defamation and interference with contractual relations. Each Melo plaintiff requests \$2 million

in compensatory damages, \$1.5 million in punitive damages, and reasonable attorneys' fees stemming from the alleged violations of their civil rights. They do not request any form of injunctive relief. Each Gurley plaintiff requests \$500,000 in compensatory damages and \$500,000 in punitive damages. Six of the Gurley plaintiffs also request reinstatement without back pay.

The procedural sequence of events is relevant to an understanding of the nature of the district court's disposition. The complaints were filed in April and May of 1989. Hafer filed her answers on June 14, 1989.<sup>1</sup> On July 6, 1989, the district court ordered both the Melo and the Gurley plaintiffs to submit joint discovery schedules by July 12, 1989, not to extend beyond September 28, 1989. However, on July 14, 1989, the court deferred the filing of a joint discovery schedule and ordered Hafer to submit her motion for summary judgment by August 9, 1989. The court consolidated the actions on July 18. West moved to stay discovery in the Melo actions on July 20, but the district court never acted on this motion.

On July 28, 1989, West filed a motion in the Melo action to dismiss or, in the alternative, for summary judgment, contending, *inter alia*, that the Melo plaintiffs' section 1983 claim was barred because they had not alleged facts sufficient to establish a conspiracy between Hafer and West whereby he was acting under color of state law.

1. On June 27, 1989, the Melo plaintiffs filed a protective action in state court against both Hafer and West incorporating by reference both the federal and state claims in their federal complaint. This action was removed by West to the Eastern District of Pennsylvania under 28 U.S.C. §§ 1441(a) and 1442(a)(1) on July 19, 1989 and consolidated with the Melo action. The Melo plaintiffs filed a motion to remand.

Concurrently, the Director of the Torts Branch of the Department of Justice filed a certification pursuant to 28 U.S.C. § 2679(d)(1), stating that "[o]n the basis of information presently available with respect to the occurrences referred to therein, defendant James J. West at all times relevant was acting within the scope of his employment as an employee of the United States." Melo App. at 195. The government also filed a motion to substitute itself for West on the Melo plaintiffs' state law claims of defamation and contractual interference, again pursuant to 28 U.S.C. § 2679(d)(1), and thereafter to dismiss these claims on the ground that under 28 U.S.C. § 2680(h) the government had not waived its sovereign immunity for claims for defamation and contractual interference.

On August 9, 1989, Hafer filed a consolidated motion for summary judgment against both the Melo and Gurley plaintiffs, contending, *inter alia*, that because she was sued only in her official capacity, the plaintiffs' claims were barred by the Eleventh Amendment, and further contending that the plaintiffs had not stated a claim for conspiracy. The Melo plaintiffs, in response to West's motion for summary judgment or dismissal, argued that the court should allow a continuance of discovery pursuant to Federal Rule of Civil Procedure 56(f), as they had no personal knowledge of what transpired between West and Hafer and would therefore not be able to submit affidavits based on the "personal knowledge" of the affiants in order to oppose the motion for summary judgment. Attached to the response was a declaration of James C. Melo to that effect. Again, in their joint response to Hafer's motion for summary judgment, the plaintiffs stated that they did not have adequate time to conduct discovery, although they did not attach the affidavit thereto.

In three separate orders issued on September 28, 1989, the district court granted Hafer's motion for summary judgment, granted the government's motion to substitute itself for West and to dismiss the Melo plaintiffs' state tort claims, and declared as moot West's motion for summary judgment. On the same day the court denied as moot the Melo plaintiffs' motion to remand the case that had been removed from state court. See note 1 *supra*.

In a subsequent opinion, the court explained its orders. It held that the plaintiffs' section 1983 claims were barred because they had sued Hafer in her official capacity and that she was not a "person" for purposes of section 1983. The court held that the Melo plaintiffs had not alleged facts showing that the alleged conspiracy between Hafer and West involved some racial or other class-based discriminatory animus, and that therefore their claim based on equal protection, if treated as filed under 42 U.S.C. § 1985(3), failed. Finally, the court held that substitution of the government for West as a defendant to the Melo plaintiffs' state law claims was "necessitated" by the Federal Tort Claims Act in light of the government's certification that West was acting within the scope of his employment, and that those claims were then dismissed because claims against the United States for defamation and contractual interference are expressly excluded under 28 U.S.C. § 2680(h) from the sovereign immunity waiver in the Federal Tort Claims Act.

Both the Melo and the Gurley plaintiffs filed timely notices of appeal, which we have consolidated for our review. We have jurisdiction over the district court's final orders pursuant to 28 U.S.C. § 1291.<sup>2</sup>

2. Hafer had counterclaimed against the Melo plaintiffs for fraud and conspiracy to commit fraud. Thereafter, the district



## III.

## Discussion

## A.

## Standard of Review

At the outset, we must consider what material is appropriately before us. The district court dismissed the action against West but denominated the dispositive order as to Hafer as the grant of summary judgment for Hafer. We have previously held that the label used by a district court, albeit indicative, "is not binding on a Court of Appeals." *Bogostan v. Gulf Oil Corp.*, 561 F.2d 434, 443 (3d Cir. 1977)(quoting *Tuley v. Heyd*, 482 F.2d 590, 593 (5th Cir. 1973)), *cert. denied*, 434 U.S. 1086 (1978); *see also Rose v. Bartle*, 871 F.2d 331, 340 (3d Cir. 1989). Rather, we must "look to the course of the proceedings and basis for decision in the district court" to determine our standard of review. *Bogostan*, 561 F.2d at 443. If the district court dismisses an action for failure to state a claim on the face of the pleadings on a motion for summary judgment, "a motion so decided is functionally equivalent to a motion to dismiss" and we must review it accordingly. *Id.* at 444; *see also* 6 J. Moore, W. Taggart & J. Wicker,

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court adopted the parties' stipulation that Hafer's counterclaims were dismissed without prejudice, with the right to reinstate them at a later date should we reverse the district court's grant of summary judgment. In response to this court's inquiry into the effect on our jurisdiction of the dismissal of the counterclaim without prejudice, Hafer notified this court by letter memorandum that she is abandoning the counterclaim and will not reassert it in the district court in the event that we remand this action for further consideration. Therefore, there is no impediment to the exercise of our appellate jurisdiction at this time.

*Moore's Federal Practice* ¶ 56.02[3], at 56-33 to 56-34 (2d ed. 1988).

The plaintiffs contend that we should not consider any discovery materials extraneous to the complaint, as they did not have an opportunity to complete discovery and the district court in fact disposed of the actions based on the face of the complaint. Hafer and West, on the other hand, argue that the plaintiffs had an adequate time to conduct discovery and we should therefore determine whether they are entitled to summary judgment based on the factual record compiled during discovery.

Although the parties have engaged in some discovery and have submitted a variety of documents external to the complaints and their answers, we conclude that we must review the district court's action as one granting a motion to dismiss. The district court's memorandum opinion makes no reference to any of the materials submitted by the parties that were extraneous to the pleadings. It is clear that the court's action rested solely on the failure of the allegations on the face of the complaint to state claims against Hafer and West. *See Bogostan*, 561 F.2d at 444 (district court order should be treated as one dismissing complaint for failure to state a claim because it "excluded everything but the complaint in granting the motions").

Furthermore, the district court's July 14, 1989 order deferred the filing of a joint discovery schedule and ordered Hafer to submit her motion for summary judgment by August 9, 1989. Although this order did not technically prohibit the parties from engaging in further discovery, it could reasonably have deterred further discovery by plaintiffs. Certainly the order demonstrates that

the court was willing to consider the defendants' dispositive motions without a complete factual record developed during a defined discovery period.

The plaintiffs' objections to proceeding with summary judgment were called to the district court's attention by the Melo plaintiffs in their response to West's motion. They sought to comply with Rule 56(f) through the declaration by Melo<sup>3</sup> in which he stated that "neither I nor the other plaintiffs would have personal knowledge of [West and Hafer's communications during the 1988 election]" and requested that the court grant a continuance of discovery until "counsel has had an opportunity to examine under oath the defendants, Mr. Bailey and all other persons who have knowledge of the matter." Melo App. at 111, 112. The district court's failure to rule on the Melo plaintiffs' request for a continuance of discovery,

3. Rule 56(f) provides in pertinent part that

[s]hould it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Fed. R. Civ. P. 56(f). We express no opinion as to whether the Melo declaration satisfies the Rule 56(f) requirements previously enunciated by this court. See *Lunderstadt v. Colafella*, 885 F.2d 66, 71-72 (3d Cir. 1989) (quoting *Dowling v. City of Philadelphia*, 855 F.2d 136, 140 (3d Cir. 1988)) ("[A] Rule 56(f) motion must identify with specificity 'what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained.'"). Nor do we express an opinion as to the effect of the failure to attach the Melo declaration to the plaintiffs' response to Hafer's motion for summary judgment.

as well as its failure to rule on West's motion for a protective order, suggests that the court considered the discovery issue irrelevant for purposes of its decision.

Because we treat the district court's orders as granting a motion to dismiss, we must determine whether, in accepting as true the factual allegations in the Melo and Gurley plaintiffs' complaints and all reasonable inferences that can be drawn therefrom, no relief can be granted under any set of facts which could be proved. See *Ransom v. Marrazzo*, 848 F.2d 398, 401 (3d Cir. 1988). For this purpose, we cannot take cognizance of the affidavits of Hafer and West denying many of the plaintiffs' factual allegations.

B.

*Individual Capacity Claim Against Hafer*

In *Will v. Michigan Dep. of State Police*, 109 S. Ct. 2304, 2312 (1989), the Supreme Court held that neither a state nor state officials sued in their official capacities for money damages are "persons" under section 1983,<sup>4</sup> and that therefore a suit brought in state court against the Michigan Director of State Police was barred. The district

4. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

...



court, relying on *Will*, concluded that the plaintiffs have sued Hafer only in her official capacity and therefore dismissed their section 1983 claims. On appeal, the plaintiffs contend that the district court erred as a matter of law.

The lines marking the boundaries between official and personal capacity suits have been drawn primarily in the context of Eleventh Amendment cases. That amendment has been interpreted to bar suits for monetary damages by private parties in federal court against a state or against state agencies. See *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).<sup>5</sup> It also bars a suit against state officials in their official capacity, because the state is the real party in interest inasmuch as the plaintiff seeks recovery from the state treasury. *Graham*, 473 U.S. at 165-166. In a suit against state officials in their "personal" capacity, however, where the plaintiff seeks recovery from the personal assets of the individual, the state is not the real party in interest; the suit is therefore not barred by the Eleventh Amendment. *Id.* at 165-68.

The *Will* Court's conclusion that section 1983 suits could not be brought against state officials in their official capacity followed from the Court's earlier Eleventh Amendment decisions. Although the *Will* Court did not have occasion to consider the status of personal capacity suits against state officials under section 1983, we conclude, borrowing the same Eleventh Amendment jurisprudence that the *Will* Court looked to, that

5. In suits for injunctive or declaratory relief, however, the Eleventh Amendment does not bar an action in which a state official is the named party. *Ex Parte Young*, 209 U.S. 123 (1908).

because personal capacity suits against state officials are actions against the individual and not the state, state officials sued for damages in their personal capacities are "persons" under section 1983 and therefore subject to suit. See, e.g., *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 567 n.10 (1st Cir. 1989).

In determining whether plaintiffs sued Hafer in her personal capacity, official capacity, or both, we first look to the complaints and the "course of proceedings." *Graham*, 473 U.S. at 167 n.14 (quoting *Brandon v. Holt*, 469 U.S. 464, 469 (1985)); see *Gregory v. Chehl*, 843 F.2d 111, 119 (3d Cir. 1988). One of the Gurley complaints, which contains a request by six of the plaintiffs for both reinstatement and damages, explicitly specifies that plaintiffs' request for reinstatement "is asserted against the defendant in her official capacity," but that their monetary claims against Hafer "are asserted against the defendant in her personal capacity."

The *Will* opinion supports maintenance of a section 1983 claim against a state official for reinstatement. The Court, relying again on the Eleventh Amendment, stated that "a State official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Will*, 109 S. Ct. at 2311 n.10 (quoting *Graham*, 473 U.S. at 167 n.14). It follows that the district court erred insofar as it dismissed the Gurley plaintiffs' claim for reinstatement against Hafer.<sup>6</sup>

6. There have been some references to arbitration proceedings initiated by plaintiffs which culminated in orders directing their reinstatement. Such awards are not relevant to the issues on appeal.



As we noted above, these Gurley plaintiffs were explicit that their monetary claims were asserted against Hafer in her individual capacity. The remaining Gurley plaintiffs and the Melo plaintiffs, although not as explicit, signified a similar intent because the captions in the complaints only list "Barbara Hafer," and not the Commonwealth of Pennsylvania, as a defendant, and only request damages from Hafer and not from the state. It appears that Hafer understood that plaintiffs sought to sue her in her personal capacity because she raised the defense of qualified immunity throughout the course of these proceedings, a defense available only for governmental officials when they are sued in their personal, and not in their official, capacity. See *Graham*, 473 U.S. at 166-67; *Conner v. Reinhard*, 847 F.2d 384, 394 n.8 (7th Cir.), cert. denied, 109 S. Ct. 147 (1988); *Melton v. City of Oklahoma City*, 879 F.2d 706, 727 n. 32 (10th Cir.), reh'g granted in part on other grounds, 888 F.2d 724 (10th Cir. 1989); *Lundgren v. McDantel*, 814 F.2d 600, 604 (11th Cir. 1987).<sup>7</sup> Moreover, once plaintiffs explained in the district court that they sued Hafer for damages in her individual capacity, they should have been given leave to amend to so assert with specificity, if there was any remaining ambiguity about that issue.

7. A defendant being sued in his or her personal capacity should be given adequate notice that his or her personal assets are at stake. Two courts of appeals apparently require the complaint to specifically identify the capacity in which a defendant is being sued. See *Wells v. Brown*, 891 F.2d 591, 593 (6th Cir. 1989); *Nix v. Norman*, 879 F.2d 429, 431 (8th Cir. 1989). Our court has taken a more flexible approach, see *Gregory v. Chehl*, 843 F.2d at 119-20 (court "must interpret the pleading"); see also *Graham*, 473 U.S. at 167 n.14. It is obviously preferable for the plaintiff to be specific in the first instance to avoid any ambiguity.

The district court held that the plaintiffs only sued Hafer in her official capacity, notwithstanding their protestations to the contrary, because Hafer would not have been empowered to effectuate the removal of plaintiffs from their positions had she been acting in her personal capacity rather than in her role as Auditor General. However, the fact that Hafer's position as Auditor General cloaked her with the authority to fire the plaintiffs merely supports the undisputed proposition that she acted under color of state law in firing the plaintiffs, a prerequisite to a successful section 1983 suit. See *Robb v. City of Philadelphia*, 733 F.2d 286, 290 (3d Cir. 1984).<sup>8</sup> It does not follow that every time a public official acts under color of state law, the suit must of necessity be one against the official in his or her official capacity. See *Graham*, 473 U.S. at 166 (to establish

8. The "under color of state law" requirement, which is identical to the "state action" requirement of the Fourteenth Amendment, requires a determination of "whether there is a sufficiently close nexus between the State and the challenged action." *Johnson v. Orr*, 780 F.2d 386, 390 (3d Cir.) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)), cert. denied, 479 U.S. 828 (1986). There is no question that Hafer, the head of the Department of Auditor General, see, 71 Pa. Cons. Stat. § 66 (Supp. 1990), is vested under state law with the authority to hire and fire employees in the Department, thereby satisfying the "under color of state law requirement." See, e.g., 71 Pa. Cons. Stat. § 66 (Supp. 1990) (Department heads shall "exercise and perform the duties by law vested in and imposed upon the department"). The plaintiffs' allegation that Hafer misused her power in firing them does not deprive her actions of the imprimatur of state authority. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)) ("[M]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of state law.'").

personal liability under section 1983 "it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right")(emphasis added).

We reject Hafer's suggestion that a state official can be sued in her personal capacity only if the allegedly unconstitutional actions were not taken in her official capacity. The Supreme Court cases expressly recognize that individual capacity suits may be brought against government officials who acted under color of state law. See, e.g., *Brandon v. Holt*, 469 U.S. 464, 472-73 (1985); *Owen v. City of Independence*, 445 U.S. 622, 637-38 (1980). In fact, underlying each of the cases considering the availability of a qualified immunity defense to a claim for damages against the state official was an individual capacity claim. See, e.g., *Malley v. Briggs*, 475 U.S. 335 (1986) (suit by arrestee against state trooper); *Davis v. Scherer*, 468 U.S. 183 (1984) (suit by employee against official of state highway department); *Tower v. Glover*, 467 U.S. 914 (1984) (suit by clients against public defenders who allegedly conspired with state officials); *Procunier v. Navarette*, 434 U.S. 555 (1978) (suit by prisoner against state prison officials); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (suit by former prisoner against state prosecuting attorney).

Hafer argues that because she has final policymaking authority over hiring and firing in the Auditor General's Department, her actions leading to the firing of the plaintiffs, even if in violation of a "just cause" dismissal policy followed by previous Auditor Generals, constitutes a new state policy and therefore precludes suit against her in her personal capacity. The Second Circuit, in a persuasive opinion, has rejected a similar argument.

In *Farid v. Smith*, 850 F.2d 917 (2d Cir. 1988), an inmate filed a civil rights action against the superintendent of the correctional facility for improperly depriving him of access to certain personal materials. The court held that although the Eleventh Amendment barred suit for damages against the superintendent in his official capacity, it did not bar the inmate from pursuing the action against the superintendent in his personal capacity, even if he was following state policy when committing such acts. *Id.* at 921. A *fortiori*, a state official who herself is responsible for an unconstitutional policy would be personally liable, unless of course she is ultimately successful in her qualified immunity claim. However, disposition on qualified immunity grounds is far different from a disposition on failure to state a claim, which is what the district court did here.

In short, we hold that a section 1983 claim for reinstatement may be maintained against Hafer in her official capacity, that a damage claim under section 1983 alleging civil rights violations may be maintained against Hafer in her individual capacity, that the allegations in the complaints adequately put her on notice of that claim, and that such a claim is not barred by the Eleventh Amendment. Just as the district court erred in dismissing the reinstatement claims because Hafer is a "person" for injunctive relief, so also the district court erred in dismissing the plaintiffs' section 1983 damage claims against Hafer individually because she is a "person" in that capacity<sup>9</sup>.

9. Hafer contends on appeal that even if we were to hold that she is being sued in her personal capacity, we should nevertheless affirm the district court's dismissal of the action, as the plaintiffs' complaints fail to state claims under either



## C.

## § 1983 Conspiracy Claim Against West

The section 1983 claim against West asserted by the Melo plaintiffs stands on a different footing than the claim against Hafer. We must consider whether, under the allegations of the complaint, West, who was not a state official, can be viewed to have been acting under color of state law. Because the district court only considered the allegation that West and Hafer conspired to deprive the Melo plaintiffs of their constitutional rights as a claim under 42 U.S.C. § 1985(3),<sup>10</sup> it did not reach this issue. A fair reading of the complaint shows that plaintiffs seek to assert a section 1983 claim, and West does not contend otherwise.

Maintenance of a section 1983 claim requires a showing that the defendant acted under color of state law, but the Supreme Court has held that private parties acting in a conspiracy with a state official to deprive others of constitutional rights are also acting "under color" of state law. See *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970); *United States v. Price*, 383 U.S. 787, 794 (1966).<sup>11</sup>

the due process clause or the First Amendment. In light of the fact that the district court did not consider these issues in the first instance, we decline to reach them on appeal.

10. The court dismissed the claim under 42 U.S.C. § 1985(3) on the ground that plaintiffs failed to allege any racial or class-based animus, as required for such a claim. See *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). The Melo plaintiffs do not challenge this ruling on appeal.

11. For this purpose we assume, without deciding, that the complaint alleges the prerequisites of a civil conspiracy. See *Hampton v. Hanrahan*, 600 F.2d 600, 620-21 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980).

Consequently, such private parties can be subject to liability under section 1983. See *Adickes*, 398 U.S. at 152. It follows that federal employees who conspire with state officials to violate someone's constitutional rights are treated as acting under color of state law. See *Hampton v. Hanrahan*, 600 F.2d 600, 623 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980).<sup>12</sup>

The Melo complaint alleges that West transmitted the "jobs bought" list to Hafer when she was a candidate "with a knowledge, understanding and expectation that he would be creating a campaign issue favorable to Ms. Hafer and that Ms. Hafer, if elected, would fire all the people on the list." Melo App. at 13. Assuming *arguendo* that the alleged working relationship between Hafer and West during the fall 1988 campaign constitutes "concerted" or "joint" action sufficient to transmute West, a private actor, into one acting under color of state law, see *Robb v. City of Philadelphia*, 733 F.2d 286, 291-92 (3d Cir. 1984); *Cruz v. Donnelly*, 727 F.2d 79, 82 (3d Cir. 1984), it is insufficient in this case because Hafer was not a state actor at the time of the alleged concerted and conspiratorial conduct.<sup>13</sup> We note

12. We therefore reject West's argument that private parties can be viewed as acting under color of state law only when state or municipal officials substituted the judgment of private parties for their own judgment. Although such a showing may be a basis for finding non-state officials to have been acting under color of state law, see *Robb v. City of Philadelphia*, 733 F.2d 286, 292 (3d Cir. 1984), it is not the only one. See note 13 *infra*.

13. We focus on the alleged conspiracy because the Melo complaint provides no allegations which could satisfy the other bases for holding a private actor to possible liability under section 1983 discussed in *National Collegiate Athletic Assoc. v. Tarkanian*, 109 S. Ct. 454, 462 (1988) (state creation

that the complaint does not allege that Hafer and West conspired at any time after Hafer took office.

It is true that conspirators can be held liable for subsequent acts taken pursuant to a conspiracy, *see Hampton*, 600 F.2d at 621, and that the Melo plaintiffs have alleged that their firing after Hafer became a state official was "in the course of, in furtherance of and was the culmination of the aforesaid conspiracy." Melo App. at 18. However adequate these allegations might be, if proven, to impose liability under civil conspiracy law generally for acts subsequent to the formation of the conspiracy, they do not supply the missing link of action under color of state law.

When a private party has been held to be acting under color of state law, it has always been because of action in conjunction with an official who was then a state actor. *See, e.g., Adickes*, 398 U.S. at 149-52; *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941-42 (1982); *United Steelworkers of America v. Phelps Dodge*, 865 F.2d 1539, 1546-47 (9th Cir.) (en banc), cert. denied, 110 S. Ct. 51 (1989); *Robb*, 733 F.2d at 291-92. It is the presence of that state actor that clothes the private party with the "under color of state law" vestment. *See Adickes*, 398 U.S. at 152 ("Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute.") (quoting *Price*, 383 U.S. at 794 (1966)) (emphasis added); *Lugar*, 457 U.S. at 941 ("private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment")

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of legal framework governing defendant's conduct, delegation of authority to defendant, and knowing acceptance of benefits derived from the defendant's conduct).

(emphasis added). When neither of the parties who allegedly conspired is a state official, there is no state actor to supply even a colorable basis for investing the private actor with a state mantle, even if one of the parties later becomes a state official. Plaintiffs have cited no case for such a proposition, and we see no reason to stretch the law so far. It follows that the Melo complaint failed to state a section 1983 claim against West, and the court did not err in dismissing that claim.

#### D.

##### *State Law Claims*

We turn finally to the dismissal of the state law claims. While the Melo action against West containing both federal and state law claims was pending in the district court, the government filed a scope of employment certification and motion to substitute itself for West. In doing so, the government followed the procedure established by the Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRTCA), which amended the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2670-2680 (1988).

FELRTCA was passed in response to *Westfall v. Erwin*, 484 U.S. 292 (1988), which held that a federal employee is immune only if s/he was acting within his/her scope of employment and was exercising governmental discretion. The primary purpose of FELRTCA was "to return Federal employees to the status they held prior to the *Westfall* decision," that is, a status of absolute immunity for activities within their scope of employment. *See* H.R. Rep. No. 100-700, 100th Cong., 2d sess., reprinted in 1988 U.S. Code Cong. & Admin. News 5945, 5947 [hereinafter H.R. Rep. No. 100-700]. To accomplish that mission,



FELRTCA established an exclusive remedy against the United States for suits based on certain negligent or wrongful acts of federal employees acting within the scope of their employment, 28 U.S.C. § 2679(b)(1) (1988), and also added a statutory procedure for certification by the Attorney General to effect a substitution of the United States for its employees in cases pending in federal courts.

The relevant provision states that:

[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1) (1988).

The district court granted the United States' motion for substitution, explaining that because the government certified that West had acted within the scope of his employment,<sup>14</sup> the substitution of the government for West was "necessitated." The court then granted the United States' motion to dismiss the state law claims of defamation and contractual interference because the FTCA's waiver of tort immunity for damages "caused by the negligent or wrongful act or omission of any employee" of the federal

14. The United States Attorney General has delegated this certification authority to United States Attorneys in consultation with the Department of Justice. See 28 U.S.C. § 510 (1988); 28 C.F.R. § 15.3(a) (1989).

government "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b)(1988), does not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h) (1988).

Although the district court stated that plaintiffs do not contest that West was acting within the scope of his employment when he allegedly performed the acts complained of, plaintiffs do in fact contest the accuracy of the scope of employment certification. We must thus consider whether the government's certification under 28 U.S.C. § 2679(d)(1)<sup>15</sup> is binding for purposes of substitution of the government, as the government argued in the district court and the district court held, or whether such a certification is subject to judicial review. The courts have divided on this issue. *Compare Nasuti v. Scannell*, Nos. 89-1830, 89-1831, 89-2001, slip op. at 31 (1st Cir. June 29, 1990) (judicial review of scope certification permitted); *Arbour v. Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990) (same); *Gogek v. Brown University*, 729 F. Supp. 926, 933 (D.R.I. 1990) (same); *Baggio*

15. The plaintiffs do not suggest that this section does not apply to a state law claim pendent to a federal claim filed initially in federal court. The plain statutory language covers this situation. We note that the government's certification of scope of employment was filed pursuant to 28 U.S.C. § 2679(d)(1), for purposes of substituting the United States for West in the federal action, and not pursuant to 28 U.S.C. § 2679(d)(2), to remove the state court action. West, however, had removed the action pursuant to other provisions of the United States Code.



*v. Lombardi*, 726 F. Supp. 922, 925 (E.D.N.Y. 1989); *Martin v. Merriday*, 706 F. Supp. 42, 44-45 (N.D.Ga. 1989) (same); *with S.J. and W. Ranch, Inc. v. Lehtinen*, 717 F. Supp. 824, 826-27 (S.D. Fla. 1989) (no judicial review of scope certification); *Mitchell v. United States*, 709 F. Supp. 767, 768 & n.4 (W.D. Tex. 1989) (same), *rev'd on other ground*, 896 F.2d 128 (5th Cir. 1990);<sup>16</sup> see also *Mitchell v. Carlson*, 896 F.2d 128, 134, 136 (5th Cir. 1990) (suggesting no judicial review of scope certification); *Aviles v. Lutz*, 887 F.2d 1046, 1049 (10th Cir. 1989) (same).

While this case was on appeal, the United States changed its position on this issue. The government now states that although the government's determination is entitled to deference, "the district court may review the Attorney General's certification that the challenged acts occurred within the scope of employment of a federal official."<sup>17</sup> In light of the division among the courts on this issue, we will analyze the issue *de novo* before establishing this court's position.

16. Two other courts of appeals, although not directly addressing this issue, have suggested that plaintiffs may seek judicial review of certification. See *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989) ("[T]he Department of Justice has determined that [defendant] was acting within the scope of his employment, a determination which is obviously correct in light of the testimony at trial."); *Lunsford v. Price*, 885 F.2d 236, 238 n.7 (5th Cir. 1989) (noting that plaintiffs did not contest certification that employees' acts were within scope of employment).

17. The relevant portion of the government's letter states:

At oral argument, the Court . . . asked the undersigned counsel whether Mr. West contended that a determination by a government agency that an employee committed an alleged tort while acting within the scope of his employment was binding and

We must first look to the language of the statute, see *United States v. James*, 478 U.S. 597, 606 (1986), and in particular to the distinction in the language between sections 2679(d)(1), governing certifications in cases filed initially in federal court, and section 2679(d)(2), authorizing the Attorney General to provide certifications for the purpose of removing actions filed in state court to federal court.<sup>18</sup> The last sentence of section 2679(d)(2) specifically provides that "[t]his

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conclusive on that issue and required that the Government be substituted as defendant. Although the Government initially advanced this interpretation of the statute following enactment, upon further inquiry counsel for Mr. West has learned that the Government's current position based on the legislative history of this statute is that the Attorney General's scope of employment determination is binding only for the purpose of the removal of a suit against a federal employee to federal court under 28 U.S.C. § 2679(d)(2). With respect to whether the United States must be substituted as defendant as to tort claims raised against a federal employee, the Government's position is that, although the government's determination is entitled to deference, the district court may review the Attorney General's certification that the challenged acts occurred within the scope of employment of a federal official.

Letter from Barbara L. Herwig and Peter R. Maier, Attorneys, Appellate Staff, Civil Division (March 20, 1990).

18. Section 2679(d)(2) provides in full that:

[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding

certification of the Attorney General shall conclusively establish scope of office or employment *for purposes of removal*." 28 U.S.C. § 2679(d)(2) (emphasis added). There is no similar language of conclusiveness in section 2679(d)(1). Also, the explicit statement that the binding character of certification applies only "for purposes of removal" suggests that Congress recognized a distinction between use of the certification for removal and its use for purposes of substitution of the government as the defendant in actions filed in federal court. See *Nasuti*, Nos. 89-1830, 89-1831, 89-1001, slip op. at 28-29.

There are significant policy reasons why Congress would choose to give the government an unchallengeable right to have a federal forum for tort suits brought against its employees. Historically, the government has generally preferred to have litigation which it or its employees are defending in the neutral confines of federal courts. For example, a similarly "absolute" right of removal is provided by 28 U.S.C. § 1442(a)(1) whenever a suit against a United States officer is filed in a state court for any act "under color of [federal] office" because, as the Supreme Court has explained, "Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum." *Willingham v. Morgan*, 395 U.S. 402, 407 (1969).

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is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

There is no suggestion in FELRTCA that once the federal forum has been secured, Congress was inclined to make the Attorney General's right to substitute the government for the employee unreviewable. In fact, Congress acknowledged the propriety of having a federal court review the scope of employment issue when the positions of the federal employee and the government conflict. Under 28 U.S.C. § 2679(d)(3)(1988), "[i]n the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment." The same provision insures a federal forum for such a judicial determination.<sup>19</sup> There is no reason why Congress would have provided employees with judicial review of the scope of employment certification decisions while denying a similar review of certification decisions to dissatisfied plaintiffs.

The legislative history of the Act also supports our reading of FELRTCA. In discussing the exclusivity issue, the House Report noted that the Federal Drivers Act, 28 U.S.C. § 2679(b)-(e) (1982) (subsequently amended in 1988), one of the components of the FTCA, provided an exclusive federal remedy when the injuries resulted from the operation of a motor vehicle by a federal employee acting within the scope of his employment. See H.R. 100-700, 1988 U.S. Code Cong. & Admin.

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19. If the employee petition is filed in an action pending in state court, the action may be removed without bond by the Attorney General to the federal court for such a determination, to be remanded if the court determines that the employee was not acting within the scope of employment. 28 U.S.C. § 2679(d)(3).



News at 5948. The Drivers Act contained a provision for a scope of employment certification by the Attorney General for purposes of removal to federal court. Although it did not set forth any scope-of-employment certification procedures for actions filed in federal court, federal courts routinely made a determination as to whether the employee was acting within his or her scope of employment before ruling whether the action could be maintained against the government exclusively. See, e.g., *Cronin v. Hertz Corp.*, 818 F.2d 1064 (2d Cir. 1987); *Borrego v. United States*, 790 F.2d 5 (1st Cir. 1986); *Levin v. Taylor*, 464 F.2d 770 (D.C. Cir. 1972).

The extensive discussion in the House Report on the factors relevant to whether an act was within the employee's scope of employment, see H.R. Rep. No. 100-700, 1988 U.S. Code Cong. & Admin. News at 5949-50, suggests that Congress intended that the practice of court determination of the issue should be continued. Representative Frank, the sponsor of the Act, confirmed that FELRTCA was meant to ensure continuity, rather than a break, with past practice when he stated at a legislative hearing that "the plaintiff would still have the right to contest the certification if they [sic] thought the Attorney General were certifying without justification." *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary*, 100th Cong., 2d Sess. 60, 128 (April 14, 1988) (statement of Representative Frank).

Based on the language, structure, and legislative history of FELRTCA, we thus independently conclude that the district court may review the government's certification that the actions which

the Melo plaintiffs allege that West took were within the scope of his employment.

It is therefore evident that we must vacate the district court's dismissal of the state law claims. The dismissals were predicated on the government's status as a defendant, which in turn is dependent on whether West was acting in the scope of employment. On remand, the parties will have an opportunity to address that issue. See 28 U.S.C. § 1346(b) (scope of employment determination under the FTCA to be made "in accordance with the law of the place where the act or omission occurred"); see also *Williams v. United States*, 350 U.S. 857 (1955) (per curiam). The district court will also have to decide which factors are relevant to that determination. The briefs of the parties have not discussed that issue.<sup>20</sup>

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20. In light of our holding, we need not reach the question of whether the government, if properly substituted for West, would be able to dismiss the action because of the exception to its waiver of sovereign immunity for claims of defamation and interference with contractual relations under 28 U.S.C. § 2680(h). Compare *Mitchell*, 896 F.2d at 134-36 (plaintiff without remedies if government, as substituted party, is immune); *Aviles*, 887 F.2d at 1049-50 (same); *Sowell*, 888 F.2d at 805-06 (same); *Moreno v. Small Business Admin.*, 877 F.2d 715 (8th Cir. 1989) (same) with *Smith v. Marshall*, 885 F.2d 650, 654-56 (9th Cir. 1989) (plaintiff may proceed against individual employee if substitution of government would lead to dismissal because of government immunity under 28 U.S.C. § 2680(k)), cert. granted sub nom. *United States v. Smith*, 110 S. Ct. 2617 (1990); *Newman v. Soballe*, 871 F.2d 969, 971-73 (11th Cir. 1989) (same).

It is unclear whether a federal employee who was not acting within the scope of his employment may yet have acted under color of his office insofar as that determination will control whether he is entitled to a federal forum, see 28 U.S.C. § 1442(a)(1), and we will not attempt to answer that entirely hypothetical question (in advance of the district



V.

*Conclusion*

For the foregoing reasons, we will vacate the orders of the district court dismissing the civil rights claims as to Hafer and dismissing the Melo plaintiffs' state law claims as to West, and remand for further proceedings consistent with this opinion. We will affirm the order dismissing the Melo plaintiffs' section 1983 claim against West.

Costs to be awarded to appellants in the Gurley action. In the Melo action, appellants to bear one-third of the costs, Hafer one-third, and West one-third.

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court's ruling on the government's scope of employment certification), the parties not having even briefed this issue. The point is relevant to the motion for remand, on which the district court must rule if it determines that West was not acting within the scope of his employment. Moreover, in view of the many uncertainties and imponderables about the status of the case on remand, we leave to the district court in the first instance the question whether, if the district court determines that West was not acting in the scope of his employment, the state law claims included in the federal action should be dismissed, see *Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187 (3d Cir. 1976), because they were pendent to a federal claim against him which has been dismissed.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals  
for the Third Circuit*

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 89-1924

JAMES C. MELO, JR.  
LOUISE JURIK  
DONAL RUGGERIO  
KAROL DANOWITZ  
JAMES DICOSIMO  
LUCILLE RUSSELL  
WALTER W. SPEELMAN  
JOHN WEIKEL,

*Appellants*

v.

BARBARA HAFER and JAMES J. WEST

No. 89-1925

CARL GURLEY  
W. GERARD BEST  
MICHAEL BRENNAN  
MARGARET CASPER  
ELIZABETH BUCHMILLER  
DANIEL CLEMON  
MARY FAGER  
GEORGE A. FRANKLIN, JR.,

*Appellants*

v.

BARBARA HAFER

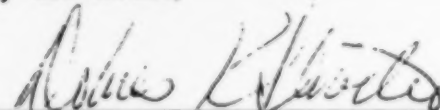
## SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, *Chief Judge*, SLOVITER,

BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD and ALITO, *Circuit Judges*

The petition for rehearing filed by Appellee Barbara Hafer in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

  
Circuit Judge

Dated: Sep 21, 1990

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES C. MELO, JR., et al.

*Plaintiffs,*

v.

BARBARA HAFER

and

JAMES J. WEST, ESQUIRE

*Defendants.*

CARL GURLEY, et al.

*Plaintiffs,*

v.

BARBARA HAFER

*Defendant.*

CIVIL ACTION

NO. 89-2935

CIVIL ACTION

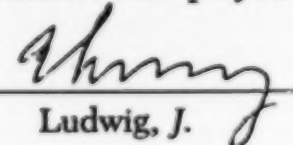
NO. 89-2685

ORDER

And now, this 28th day of Sept., 1989, it is hereby ORDERED and DECREED that Defendant Barbara Hafer's Motion for Summary Judgment is GRANTED and:

(1) Civil Action No. 89-2935 is dismissed with prejudice;  
and

(2) Civil Action No. 89-2685 is dismissed with prejudice.

  
Ludwig, J.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CARL GURLEY, et. al. : CIVIL ACTION

v. : NO. 89-2685

BARBARA HAFER :  
.....

JAMES C. MELO, JR., et. al. : CIVIL ACTION  
NO. 89-2935

v. :

BARBARA HAFER and :  
JAMES J. WEST, ESQUIRE :  
.....

MEMORANDUM

Ludwig, J.

October 18, 1989

These are two interrelated § 1983 actions.<sup>1</sup> One of them – the *Gurley* action – is against Barbara Hafer, Auditor General of Pennsylvania. The other – the *Melo* action – is against Barbara Hafer and James J. West, Esquire, the United States Attorney for the Middle District of Pennsylvania. In both, Hafer moves for summary judgment. Fed.R.Civ.P. 56(c). West moved to dismiss the complaint or, in the alternative, for summary judgment. Fed.R.Civ.P. 12(b)(6), 56(c). Thereafter, the United States moved to be substituted for West on the complaint's state law counts and to dismiss for failure to state a claim on which relief could be granted. Fed.R.Civ.P. 12(b)(6).

Orders were entered September 28, 1989 granting Hafer's motion for summary judgment and the motion of the United States to be substituted for West, together with its motion to

1. Jurisdiction is federal question, 28 U.S.C. § 1331 and 42 U.S.C. § 1983. The action against Hafer and West also contains a § 1985 count.

dismiss as to the state counts; and dismissing West's motion as to the federal law counts as moot.

In both actions, the complaints allege that defendant Hafer violated plaintiffs' constitutional rights by firing plaintiffs – 16 in all – from their employment in the Pennsylvania Auditor General's Office.<sup>2</sup> In *Gurley*, she is alleged to have done so because of their Democratic political affiliation and in violation of the Auditor General's established hiring and discharge regulations. In *Melo*, she and West are alleged to have conspired together to cause the firings. Against West, state claims for defamation and interference with contractual relations are also asserted.

According to the *Melo* complaint, West, on January 21, 1988, gave Donald Bailey, the incumbent Auditor General, a list of 21 employees, including plaintiffs, who were suspected of having "bought" their job through political contributions. Amended complaint at 6. West, a Republican, also provided Hafer, then the Republican candidate for Auditor General, with a copy of the list after an internal investigation by Bailey's office had cleared plaintiffs of any wrongdoing.

Subsequently, Hafer stated during the election campaign that if elected, based on the information received from West, she would fire those named on the list. *Id.* On January 16, 1989 Hafer was inaugurated, and on February 1, 1989, she fired 18 employees, including the *Melo* plaintiffs. On February 21, 1989, she fired the *Gurley* plaintiffs, who though not on the list were terminated as part of a managerial reorganization.

The law of suability of governmental officials continues to be evolving. In *Will v. Michigan Department of State Police*, \_\_ U.S. \_\_, 109 S.Ct 2304, 2312 \_\_L.Ed.2d \_\_ (1989), it was decided that a § 1983 action in state court did not lie against a State or its officials acting in their official capacity. The reason is that they are not "persons" under 42 U.S.C. § 1983 and, as such, were not intended by Congress to be suable under that

2. By orders of July 17, 1989 the three actions against Hafer alone were consolidated under C.A. No. 89-2685; and the eight actions against Hafer and West were consolidated under C.A. No. 89-2935.



act.<sup>3</sup> "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Will*, \_\_\_ U.S. at \_\_\_, 109 S.Ct. at 2311. See also *Quern v. Jordan*, 440 U.S. 332, 350, 99 S.Ct. 1139, 1150, 59 L.Ed.2d 358 (1979) (Brennan, J. concurring: "[T]he Court. . . conclude[s], in what is patently dicta, that a State is not a 'person' for the purposes of 42 U.S.C. § 1983"); "[I]n common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667, 99 S.Ct. 2529, 2537, 61 L.Ed.2d 153 (1979), quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604, 61 S.Ct. 742, 743, 85 L.Ed. 1071 (1941).

However, the distinction between official and individual or personal capacity suits can be elusive. A useful explanation of the dichotomy is set out in *Kentucky v. Graham*, 473 U.S. 159, 167-168, 105 S.Ct. 3099, 3105-3106, 87 L.Ed.2d 114 (1985), reversing the imposition of attorney fees on a State after plaintiff had prevailed against its police commissioner acting in his personal capacity:

Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." [A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the

3. 42 U.S.C. § 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

On the merits, to establish) *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. More is required in an official-capacity action, however, for a governmental entity is liable under § 1983 only when the entity itself is a "moving force" behind the deprivation, . . . thus, in an official-capacity suit the entity's "policy or custom" must have played a part in the violation of federal law. When it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses such as objectively reasonable reliance on existing law. In an official-capacity action, these defenses are unavailable. The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity *qua* entity, may possess, such as the Eleventh Amendment. While not exhaustive, this list illustrates the basic distinction between personal- and official-capacity actions.

(Citations and footnotes omitted. Emphasis in original.)

No decision appears to have dealt explicitly with whether a discharge from state employment is an official or personal action by the individual ordering the termination. In *Lewis v. Kelchner*, 658 F.Supp. 358 (M.D. Pa. 1986), a former state university employee filed a wrongful discharge suit against the university, its president, and the Pennsylvania State System of Higher Education. Plaintiff sued the university president in both his official and individual capacities. The official capacity suit was held barred by the Eleventh Amendment. Summary judgment was also granted for the university president in his individual capacity since the complaint attacked only the termination of plaintiff's employment with the university. By implication, the discharge was considered to have been official conduct on the university president's part. *Id.* at 361-62.

Hafer's removal of plaintiffs from their positions occurred in her role as Auditor General, a constitutional officer under the Pennsylvania Constitution. Pa. Const. art. IV, § 18. Although Hafer, as Auditor General, directed the firings, plaintiffs were employees of the Commonwealth, not of Hafer. Their grievances are directed against the impact of the Commonwealth's termination of their employment. Hafer's power to cause the terminations derived solely from her authority as a state official. Had Hafer been acting in a personal capacity, she would not have been empowered to effectuate the discharges. Her campaign statements made before she took office, albeit personal conduct, do not provide grounds for § 1983 relief. If Hafer had not been elected, or if she had not fired plaintiffs, there would not have been a basis for these § 1983 causes of action.<sup>4</sup>

4. The actions against Hafer also implicate state sovereign immunity under the Eleventh Amendment: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. Const. Amend. XI.

A suit may be barred by the Eleventh Amendment, although the State is not a named defendant. See *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S.Ct. 1347, 1356, 39 L.Ed.2d 662 (1974). The bar is effective in a damage suit against a state officer where the State itself is the real party in interest. See *id.*, 415 U.S. at 663, 94 S.Ct. at 1356. "[T]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984).

It has been ruled that Congress did not intend to abrogate state sovereign immunity in passing the Civil Rights Act of 1871, the precursor to § 1983. See *Quern v. Jordan*, 440 U.S. 332, 341, 99 S.Ct. 1139, 1145, 59 L.Ed.2d 358 (1979). A suit in federal court against a state officer based on a § 1983 cause of action therefore remains subject to Eleventh Amendment restrictions. The Court in *Will v. Michigan Department of State Police* noted that although the parameters of the Eleventh Amendment and of § 1983 are separate issues, "in deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of § 1983 that disregards it." *Id.*, 109 S.Ct. at 2309.

A determination of the Eleventh Amendment defense asserted by Hafer is unnecessary. Moreover, much of the constitutional reasoning entailed is incorporated in the statutory construction of *Will* that a state officer acting in an official capacity is not a § 1983 "person." That this holding occurred in a

As to plaintiffs' claims against Hafer and West, a conspiracy to interfere with civil rights may be actionable under 42 U.S.C. § 1985(3):

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

It is established, however, that § 1985(3) is restricted to conspiracies involving some racial or other class-based discriminatory animus. See *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971); *Moire v. Temple University School of Medicine*, 613 F.Supp. 1360, 1366 (E.D. Pa. 1985). As noted in *Griffin*:

That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others . . . . The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose - by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors . . . . The language requiring intent to deprive of *equal* protection or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.

*Griffin, supra*, 403 U.S. at 102, 91 S.Ct. at 1798. (Emphasis in original.) The *Melo* complaint does not set forth facts to show

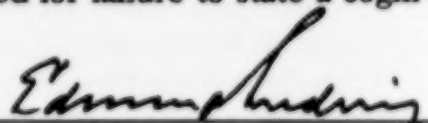
state court action is immaterial to the enforcement of such an action. Parenthetically, whether a State's discharge of an employee be considered from the viewpoint of § 1983 or of the Eleventh Amendment, it is essentially a state matter; the same objectives may be described.



that plaintiffs are a class protected by the statute. There is no allegation or evidence suggesting the requisite class-based animus for a § 1985 conspiracy claim.<sup>5</sup>

The substitution of the Government for West was necessitated by the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679(b)(1). An action for injury or loss of property resulting from the negligent or unlawful act of a government employee acting within the scope of his office or employment must be directed exclusively against the United States. 28 U.S.C. § 2679(b)(1). See *Robinson v. Egnor*, -699 F.Supp. 1207, 1214 (E.D. Va. 1988). Any action against the employee arising out of the same subject matter is prohibited. 28 U.S.C. § 2679 (b) (1) .

The Government certified West's conduct in this case to have been within the scope of his employment as United States Attorney, 28 U.S.C. § 2679(d)(1), (d)(2). See *Mackey v Vleck*. No. C88-0287-8, slip op. at 3 (D. Wyo. March 1, 1989). Plaintiffs' response does not contest this point. Under 28 U.S.C. § 2680(h), actions against the United States for defamation and tortious interference with contract rights are expressly excluded from the sovereign immunity waiver. Counts V and VI of the amended complaint were dismissed for failure to state a cognizable claim.<sup>6</sup>

  
Edmund V. Ludwig, J.

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5. It would appear to follow from *Will v. Michigan Department of State Police*, *supra*, that a state officer acting in an official capacity can not be a "person" under § 1985, the civil rights conspiracy statute, as well as under § 1983.

6. The *Melo* complaint does not allege and there is no contention that West is a *Bivens* defendant. See plaintiffs' answer to West's motion to dismiss the complaint, at 7.



(2)

No. 90-681

Supreme Court, U.S.  
FILED

FEB 1 1991

JOSEPH F. SPANIOL, JR.  
CLERK

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

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BARBARA HAFFER,

*Petitioner,*

vs.

JAMES C. MELO, JR. AND  
CARL GURLEY, ET AL.,

*Respondents.*

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**ANSWER TO PETITION FOR WRIT OF  
CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

---

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. May the victim of a civil rights violation committed by an elected state official sue the official in the official's personal capacity for monetary damages under 42 U.S.C. 1983?

2. Does such a suit violate the Eleventh Amendment to the Constitution of the United States?



## COUNTERSTATEMENT OF THE CASE

The proceedings in the Court of Appeals arose from what was originally 11 separate law suits filed in the District Court. These original 11 law suits were then consolidated in the District Court into two cases, *Melo* and *Gurley*. Both the *Melo* and the *Gurley* cases were dismissed by the District Court in one joint Order. Both cases were then consolidated in the Court of Appeals and were adjudicated in one Opinion.

Because the District Court directed the defendants to file Motions for Summary Judgment before completion of discovery and because the District Court's Opinion was based solely upon the allegations on the face of the Complaint, the Court of Appeals treated the District Court's Order as one granting a Motion to Dismiss the Complaint. Accordingly, the "facts" before the Court of Appeal were the facts alleged in the *Melo* and *Gurley* Complaints. (A. 9-12). These "facts", as recited by the Court of Appeals, were as follows:

1. Defendant Barbara Hafer was elected Auditor General of Pennsylvania in November of 1988. She defeated the incumbent, Donald Dailey. (A. 4-5).

2. During her election campaign, Hafer stated that she had received a list of 21 employees in the Auditor General's Department who allegedly bought their jobs and that, if elected, she would fire all employees on the list. (A. 4-5).

3. On February 1, 1989, Hafer fired 18 employees whose names were on the list, including the 8 Melo plaintiffs. She stated that her reason for firing these employees was that they were involved in a job-buying scheme. Hafer also stated to a reporter that the 18 employees whom she fired had paid up to \$5,000.00 for their jobs and this statement appeared in a newspaper on February 2, 1989. (A. 5).

4. On February 21, 1989, Hafer fired the Gurley plaintiffs without explanation. All of the Gurley plaintiffs had been supporters of Bailey in the November 1988 election. (A. 6).<sup>1</sup>

5. The Melo plaintiffs sought only monetary damages, both compensatory and punitive. Two of the Gurley plaintiffs also sought only monetary damages. Six of the Gurley plaintiffs also requested prospective non-monetary relief in the form of reinstatement *without* retroactive pay. (A. 6).

6. The Melo and Gurley Complaints allege causes of action against Hafer but not the Commonwealth of Pennsylvania. The Complaints did not allege that Hafer was an employee or agent of the Commonwealth of Pennsylvania. (A. 30-43). The Commonwealth did not receive notice of the suits nor was the Commonwealth given an opportunity to respond. (A. 44-49). No monetary damages were sought from the Commonwealth. The Complaints did not allege that the Commonwealth was the moving force behind the deprivation of the plaintiffs' civil rights or that the Commonwealth's policy or custom played a part in the civil rights violation. (A. 30-43). Hafer asserted the personal immunity defense of qualified immunity in her Answers to the Complaints. (A. 56). Both the Melo and the Gurley plaintiffs stated to the District Court that they were suing Hafer in her individual capacity. (A. 14, 15).

7. The Court of Appeals was satisfied that all plaintiffs had adequately explained to the District

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1. Hafer's statement at Page 3 of her Brief that the Gurley plaintiffs were "terminated as part of a management overhaul of the Department" is incorrect. No such allegation was made in the Gurley Complaints or considered by either the District Court or the Court of Appeals.

Court that their claims for monetary damages were asserted against Hafer in her individual capacity only. (A. 14, 15). Hafer is incorrect when she states at Page 5 of her Petition that the "principal basis" for the decision of the Court of Appeals was that only six of the eight Gurley plaintiffs expressly asserted claims for monetary damages against Hafer in her "personal capacity".

## ARGUMENT

### I. A STATE OFFICIAL IS A "PERSON" WITHIN THE MEANING OF 42 U.S.C. 1983 WHEN SUED FOR MONETARY DAMAGES IN THE OFFICIAL'S INDIVIDUAL CAPACITY

In *Will vs. Michigan Department of State Police*, 109 S.Ct. 2304 (1989), this Court held that a state was not a person under 42 U.S.C. 1983. The defendants in *Will* were the Michigan Department of State Police and the Michigan Director of State Police "in his official capacity". Mr. Will did not sue any individual in a personal capacity. Instead, he sued an administrative agency (Department of State Police) and the head of that agency "in his official capacity". The Director of State Police was not sued in a personal capacity nor does it appear that any damages were sought from him personally. Damages were sought from the public treasury and therefore the state (Michigan) was the true party in interest. Citing *Kentucky vs. Graham*, 473 U.S. 159, 105 S.Ct. 3099 (1985) and *Brandon vs. Holt*, 469 U.S. 464, 105 S.Ct. 873 (1985), Mr. Justice White stated:

"Obviously, state officials literally are persons. But a suit against a state official *in his or her official capacity* is not a suit against the official but rather is a suit against the official's office. *Brandon vs. Holt*, . . . As such, it is no different from a suit against the State itself. See e.g., *Kentucky vs. Graham*, . . ." (Page 2311) (Emphasis supplied)

A civil rights suit against the "state itself" seeks money from the public treasury and would permit a federal court to dictate the disposition of state tax revenues. Such a situation was repugnant to Congress when it enacted 42 U.S.C. 1983. Mr. Justice White went on to state in *Will* that:

"Although there were sharp and heated debates, the discussion of Section 1 of the Bill, which contained the present Section 1983, was not extended. And although in other

respects the impact on State sovereignty was much talked about, no one suggested that Section 1 would subject the states themselves to a damage suit under Federal law. *Quern*, 444 U.S. at 343. . . . There was complaint that Section 1 would subject state officers to damage liability, but no one suggested that it would also expose the states themselves. *Cong. Globe*, 42d Cong., 1st Sess. 366, 385 (1871)." (Page 2310)

The Melo and Gurley plaintiffs seek monetary damages from Hafer only in her personal capacity. No monetary damages have been sought from the Commonwealth of Pennsylvania. Therefore, these claims do not subject Pennsylvania to a damages suit under federal law or threaten an invasion of a state public treasury.

All of the factors cited in *Kentucky vs. Graham*, supra, to show that a suit is a personal capacity and not an official capacity suit are present in the instant case. For example:

1. Personal capacity suits seek to impose personal liability upon a government official for actions taken under color of state law. Official capacity suits, in contrast, plead an action against an entity of which the officer is merely an agent. In the instant case, plaintiffs did not plead an action against the Commonwealth of Pennsylvania or allege that Hafer was an agent of the Commonwealth of Pennsylvania.

2. An official capacity suit is one where the government entity receives notice and an opportunity to respond. Plaintiffs did not serve the Commonwealth or the State Attorney General with a copy of the Complaint or request that the Commonwealth respond to the Complaint because the Commonwealth was not a party. Further, Hafer was represented by private counsel and not the Pennsylvania Attorney General's Office.

3. In an official capacity suit, damages are sought from the government entity itself and the entity is the real party in interest. In a personal capacity suit, an award of damages would be executed only against the official's personal assets. In the instant case, plaintiffs' claims for damages are made only against Hafer and her personal assets.

4. To establish the merits of a personal liability action, plaintiffs need only show that the official, acting under color of state law, caused a deprivation of a civil right. In an official capacity suit, plaintiff must show that the entity itself was the moving force behind the deprivation and that the entity's policy or custom played a part in the violation of federal law. In the instant case, plaintiffs did not plead that the Commonwealth was a moving force behind the deprivation or that the Commonwealth's policy or custom played a part in the violation of federal law.

5. In a personal capacity suit, the defendant may assert personal immunity defenses such as qualified immunity. Hafer did assert such a defense in her Answers to the Complaints.

In *Brandon vs. Holt*, 469 U.S. 464, 105 S.Ct. 873 (1985), this Court held that it was for the plaintiff to identify whether the suit was personal or official and whether the claim was asserted against the office or the particular person who held the office. In that way, the Court could determine the real party in interest, i.e., the public treasury or private purse. The Court further stated that it was not necessary that the identification be made in the Complaint as long as it became clear in the course of proceedings whether plaintiff was proceeding against the person or the office. In *Brandon*, it was made clear at least at the summary judgment stage that plaintiff was proceeding against the office and the Court adjudicated the case on that basis



even though a subsequent amendment to the pleadings might be necessary. In the instant case, plaintiffs did explain to the District Court that they had sued Hafer for damages in her individual capacity. (A. 16). Therefore, the case should have been adjudicated on that basis.

In summary, the essential reason why a state is not a person for a 1983 suit for damages is that Congress intended that the federal courts be the primary forum for vindication of civil rights violations and that Congress found it abhorrent for the federal judiciary to dictate the disposition of state treasury funds. However, where state treasury funds are not at issue, i.e., where a state official is sued in an individual capacity, there is no impediment to a suit under 42 U.S.C. 1983 against a "person" who happens to be a state official.

## **II. THE ELEVENTH AMENDMENT DOES NOT BAR A PERSONAL CAPACITY SUIT AGAINST A STATE OFFICIAL**

The Court in *Will vs. Michigan*, supra, drew heavily upon cases interpreting the Eleventh Amendment in reaching the conclusion that 42 U.S.C. 1983 would not permit suits for monetary damages where the state was the real party in interest. The basic concern was the same, i.e., federal courts should not dictate the disbursement of state public treasury funds. Therefore, as long as a money judgment would be paid from a private purse and not a state public treasury, the Eleventh Amendment does not bar a personal capacity suit under 42 U.S.C. 1983.

## **CONCLUSION**

The Third Circuit Court of Appeals correctly determined that on the basis of the facts alleged in the Melo and Gurley Complaints, plaintiffs stated valid personal capacity suits against Hafer under 42 U.S.C. 1983 to recover monetary damages and that the fact that plaintiffs were proceeding against Hafer in her personal capacity was made abundantly clear to the District Court. Therefore, a Writ of Certiorari to review the Judgment Order of the Third Circuit should be denied.

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Filed August 21, 1990

### UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No. 89-1924

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JAMES C. MELO, JR.  
LOUISE JURIK  
DONALD RUGGERIO  
KAROL DANOWITZ  
JAMES DICOSIMO  
LUCILLE RUSSELL  
WALTER W. SPEELMAN  
JOHN WEIKEL,

*Appellants*

v.

BARBARA HAFER and JAMES J. WEST

---

No. 89-1925

---

CARL GURLEY  
W. GERARD BEST  
MICHAEL BRENNAN  
MARGARET CASPER  
ELIZABETH BUCHMILLER  
DANIEL CLEMSON  
MARY FAGER  
GEORGE A. FRANKLIN, JR.

*Appellants*

v.

BARBARA HAFER



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Appeals from the United States District Court  
for the Eastern District of Pennsylvania  
(D.C. Civil Nos. 89-2935 & 89-2685)

---

Argued March 16, 1990

Before: SLOVITER, BECKER and STAPLETON,  
*Circuit Judges*

(Filed: August 21, 1990)

---

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**OPINION OF THE COURT**

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SLOVITER, *Circuit Judge*.

I.

*Introduction*

This is an appeal from the district court's dismissal of two civil rights actions. In the action with Carl Gurley as the lead plaintiff, eight terminated employees assert a claim under 42 U.S.C. § 1983 alleging that their discharge by Barbara Hafer, the Auditor General of Pennsylvania, was political and therefore violated their due process and First Amendment rights. In the action with James C. Melo as the lead plaintiff, eight other terminated employees, who similarly allege a violation of their civil rights by Hafer, further allege that Hafer and James West, the acting United States Attorney for the Middle District of Pennsylvania, conspired to deprive them of their civil rights. The Melo plaintiffs also assert state law claims against West.

This appeal requires us to consider whether a claim for monetary relief brought under 42 U.S.C. § 1983 may be maintained against a state official in her individual capacity, whether a claim under the same statute may be maintained against a federal official when he is alleged to have conspired with a candidate for state office, and whether a

scope of employment certification issued by the government in a claim brought under the Federal Tort Claims Act is reviewable.

## II.

### *Facts and Procedural History*

The eight plaintiffs whose complaints were consolidated into the Melo action allege that they were employed in various capacities through January 1989 in the Pennsylvania Auditor General's Office, during which time they had compiled satisfactory work records. The complaints allege that sometime after John Kerr, a former employee in the Auditor General's Office, admitted that he received payments to influence either hiring or promotion decisions for 21 employees in the Auditor General's Office, acting United States Attorney West provided a list of the 21 employees to Donald Bailey, the then-Auditor General, in a confidential letter dated on or about January 21, 1988. The letter stated that "[w]e can express no opinion on whether these listed individuals knew of the purchase of their job" and it contained the request "that you keep these names strictly confidential, not use them for any type of media disclosures other than necessary to appropriate administrative proceedings, and make them available only to your most trusted employees on a need-to-know basis." Melo App. at 11. Bailey subsequently conducted an investigation of the 21 employees through his Chief Counsel, James L. McAneny, and McAneny concluded that the Melo plaintiffs committed no wrongdoing nor were they aware of any wrongdoing committed on their behalf.

On or about April 30, 1988, Hafer was nominated as the Republican candidate for Auditor General and Bailey, the incumbent, was nominated as the Democratic candidate. The complaints allege that the Melo plaintiffs were registered Democrats and West was a registered Republican. They allege that during the election campaign

between Hafer and Bailey, West provided Hafer with a copy of the letter he sent to Bailey and advised Hafer that the 21 employees on the list "bought their jobs"; that West was "motivated by a desire to assist [Hafer] in the November, 1988 election and to create and/or foster a campaign issue that favored Ms. Hafer"; and that West provided the list with "a knowledge, understanding and expectation that . . . Ms. Hafer, if elected, would fire all of the people on the list." Melo App. at 13. Hafer allegedly stated on numerous occasions during the campaign that she received the "jobs-bought" list from West and that, if elected, she would fire all employees on the list.

Hafer was elected as Auditor General in November 1988. According to the complaints, on February 1, 1989, Hafer, without conducting any additional investigation to determine the alleged involvement of the Melo plaintiffs in the job-buying scheme, fired 18 employees whose names appeared on the "jobs bought" list, including all eight Melo plaintiffs. In her letters terminating the Melo plaintiffs' employment, Hafer stated that the dismissal was "necessary based on information gathered by my office as well as through cooperation with other governmental agencies as a result of an investigation of your involvement in a job buying and/or a job promotion scheme in the Auditor General's Office." Melo App. at 14. The Melo plaintiffs allege that Hafer did not follow the provisions in the Auditor General's Policy and Procedure Manual, in effect since on or about January 1986, which includes procedural protections and a "just cause" requirement for dismissals.

The complaints also allege that an article in the February 2, 1989 edition of the Patriot-Capital News quoted both Hafer, as stating that she was firing 18 employees who had paid "up to \$5,000 each for their jobs under a previous administration," and West, as stating that "he appreciated Ms. Hafer's definitive action in firing the eighteen employees."

The factual allegations and legal claims against Hafer alleged by the Gurley plaintiffs are similar to those made by the Melo plaintiffs. The Gurley plaintiffs allege that they had been continuously employed at the Auditor General's Office in various capacities until February 21, 1989 and had performed their work satisfactorily; that all but one of them were registered Democrats; that all had been supporters of Bailey in the November 1988 election for Auditor General; and that on February 21, 1989, Hafer discharged them without explanation. Unlike the Melo plaintiffs, they have not sued West and make no allegations as to him.

The claims made by the plaintiffs under 42 U.S.C. § 1983 are that their firing by Hafer deprived them of their right to procedural and substantive due process and interfered with their First Amendment freedom of political association. The Melo plaintiffs also allege that Hafer and West engaged in a conspiracy to deprive them of due process and equal protection of the law, and they include the state law claims against West of defamation and interference with contractual relations. Each Melo plaintiff requests \$2 million in compensatory damages, \$1.5 million in punitive damages, and reasonable attorneys' fees stemming from the alleged violations of their civil rights. They do not request any form of injunctive relief. Each Gurley plaintiff requests \$500,000 in compensatory damages and \$500,000 in punitive damages. Six of the Gurley plaintiffs also request reinstatement without back pay.

The procedural sequence of events is relevant to an understanding of the nature of the district court's disposition. The complaints were filed in April and May of 1989. Hafer filed her answers on June 14, 1989.<sup>1</sup> On July 6, 1989,

1. On June 27, 1989, the Melo plaintiffs filed a protective action in state court against both Hafer and West incorporating by reference both the federal and state claims in their federal complaint. This action was

the district court ordered both the Melo and the Gurley plaintiffs to submit joint discovery schedules by July 12, 1989, not to exceed beyond September 28, 1989. However, on July 14, 1989, the court deferred the filing of a joint discovery schedule and ordered Hafer to submit her motion for summary judgment by August 9, 1989. The court consolidated the actions on July 18. West moved to stay discovery in the Melo actions on July 20, but the district court never acted on this motion.

On July 28, 1989, West filed a motion in the Melo action to dismiss or, in the alternative, for summary judgment, contending, *inter alia*, that the Melo plaintiffs' section 1983 claim was barred because they had not alleged facts sufficient to establish a conspiracy between Hafer and West whereby he was acting under color of state law. Concurrently, the Director of the Torts Branch of the Department of Justice filed a certification pursuant to 28 U.S.C. § 2679(d)(1), stating that "[o]n the basis of information presently available with respect to the occurrences referred to therein, defendant James J. West at all times relevant was acting within the scope of his employment as an employee of the United States." Melo App. at 195. The government also filed a motion to substitute itself for West on the Melo plaintiffs' state law claims of defamation and contractual interference, again pursuant to 28 U.S.C. § 2679(d)(1), and thereafter to dismiss these claims on the ground that under 28 U.S.C. § 2680(h) the government had not waived its sovereign immunity for claims for defamation and contractual interference.

On August 9, 1989, Hafer filed a consolidated motion for summary judgment against both the Melo and Gurley plaintiffs, contending, *inter alia*, that because she was sued

removed by West to the Eastern District of Pennsylvania under 28 U.S.C. §§ 1441(a) and 1442(a)(1) on July 19, 1989 and consolidated with the Melo action. The Melo plaintiffs filed a motion to remand.



only in her official capacity, the plaintiffs' claims were barred by the Eleventh Amendment, and further contending that the plaintiffs had not stated a claim for conspiracy. The Melo plaintiffs, in response to West's motion for summary judgment or dismissal, argued that the court should allow a continuance of discovery pursuant to Federal Rule of Civil Procedure 56(f), as they had no personal knowledge of what transpired between West and Hafer and would therefore not be able to submit affidavits based on the "personal knowledge" of the affiants in order to oppose the motion for summary judgment. Attached to the response was a declaration of James C. Melo to that effect. Again, in their joint response to Hafer's motion for summary judgment, the plaintiffs stated that they did not have adequate time to conduct discovery, although they did not attach the affidavit thereto.

In three separate orders issued on September 28, 1989, the district court granted Hafer's motion for summary judgment, granted the government's motion to substitute itself for West and to dismiss the Melo plaintiffs' state tort claims, and declared as moot West's motion for summary judgment. On the same day the court denied as moot the Melo plaintiffs' motion to remand the case that had been removed from state court. *See* note 1 *supra*.

In a subsequent opinion, the court explained its orders. It held that the plaintiffs' section 1983 claims were barred because they had sued Hafer in her official capacity and that she was not a "person" for purposes of section 1983. The court held that the Melo plaintiffs had not alleged facts showing that the alleged conspiracy between Hafer and West involved some racial or other class-based discriminatory animus, and that therefore their claim based on equal protection, if treated as filed under 42 U.S.C. § 1985(3), failed. Finally, the court held that substitution of the government for West as a defendant to the Melo plaintiffs'

state law claims was "necessitated" by the Federal Tort Claims Act in light of the government's certification that West was acting within the scope of his employment, and that those claims were then dismissed because claims against the United States for defamation and contractual interference are expressly excluded under 28 U.S.C. § 2680(h) from the sovereign immunity waiver in the Federal Tort Claims Act.

Both the Melo and the Gurley plaintiffs filed timely notices of appeal, which we have consolidated for our review. We have jurisdiction over the district court's final orders pursuant to 28 U.S.C. § 1291.<sup>2</sup>

### III.

#### *Discussion*

#### A.

#### *Standard of Review*

At the outset, we must consider what material is appropriately before us. The district court dismissed the action against West but denominated the dispositive order as to Hafer as the grant for summary judgment for Hafer. We have previously held that the label used by a district court, albeit indicative, "'is not binding on a Court of Appeals.'" *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 443 (3d

2. Hafer had counterclaimed against the Melo plaintiffs for fraud and conspiracy to commit fraud. Thereafter, the district court adopted the parties' stipulation that Hafer's counterclaims were dismissed without prejudice, with the right to reinstate them at a later date should we reverse the district court's grant of summary judgment. In response to this court's inquiry into the effect on our jurisdiction of the dismissal of the counterclaim without prejudice, Hafer notified this court by letter memorandum that she is abandoning the counterclaim and will not reassert it in the district court in the event that we remand this action for further consideration. Therefore, there is no impediment to the exercise of our appellate jurisdiction at this time.

Cir. 1977) (quoting *Tuley v. Heyd*, 482 F.2d 590, 593 (5th Cir. 1973)), *cert. denied*, 434 U.S. 1086 (1978); *see also* *Rose v. Bartle*, 871 F.2d 331, 340 (3d Cir. 1989). Rather, we must "look to the course of the proceedings and basis for decision in the district court" to determine our standard of review. *Bogosian*, 561 F.2d at 443. If the district court dismisses an action for failure to state a claim on the face of the pleadings on a motion for summary judgment, "a motion so decided is functionally equivalent to a motion to dismiss" and we must review it accordingly. *Id.* at 444; *see also* 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 56.02[3], at 56-33 to 56-34 (2d ed. 1988).

The plaintiffs contend that we should not consider any discovery materials extraneous to the complaint, as they did not have an opportunity to complete discovery and the district court in fact disposed of the actions based on the face of the complaint. Hafer and West, on the other hand, argue that the plaintiffs had an adequate time to conduct discovery and we should therefore determine whether they are entitled to summary judgment based on the factual record compiled during discovery.

Although the parties have engaged in some discovery and have submitted a variety of documents external to the complaints and their answers, we conclude that we must review the district court's action as one granting a motion to dismiss. The district court's memorandum opinion makes no reference to any of the materials submitted by the parties that were extraneous to the pleadings. It is clear that the court's action rested solely on the failure of the allegations on the face of the complaint to state claims against Hafer and West. *See Bogosian*, 561 F.2d at 444 (district court order should be treated as one dismissing complaint for failure to state a claim because it "excluded everything but the complaint in granting the motions").

Furthermore, the district court's July 14, 1989 order

deferred the filing of a joint discovery schedule and ordered Hafer to submit her motion for summary judgment by August 9, 1989. Although this order did not technically prohibit the parties from engaging in further discovery, it could reasonably have deterred further discovery by plaintiffs. Certainly the order demonstrates that the court was willing to consider the defendants' dispositive motions without a complete factual record developed during a defined discovery period.

The plaintiffs' objections to proceeding with summary judgment were called to the district court's attention by the Melo plaintiffs in their response to West's motion. They sought to comply with Rule 56(f) through the declaration by Melo<sup>3</sup> in which he stated that "neither I nor the other plaintiffs would have personal knowledge of [West and Hafer's communications during the 1988 election]" and requested that the court grant a continuance of discovery until "counsel has had an opportunity to examine under oath the defendants, Mr. Bailey and all other persons who

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3. Rule 56(f) provides in pertinent part that

[s]hould it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Fed. R. Civ. P. 56(f). We express no opinion as to whether the Melo declaration satisfies the Rule 56(f) requirements previously enunciated by this court. *See Lunderstadt v. Colafella*, 885 F.2d 66, 71-72 (3d Cir. 1989) (quoting *Dowling v. City of Philadelphia*, 855 F.2d 136, 140 (3d Cir. 1988)) ("[A] Rule 56(f) motion must identify with specificity 'what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained.'"). Nor do we express an opinion as to the effect of the failure to attach the Melo declaration to the plaintiffs' response to Hafer's motion for summary judgment.



have knowledge of the matter." Melo App. at 111, 112. The district court's failure to rule on the Melo plaintiffs' request for a continuance of discovery, as well as its failure to rule on West's motion for a protective order, suggests that the court considered the discovery issue irrelevant for purposes of its decision.

Because we treat the district court's orders as granting a motion to dismiss, we must determine whether, in accepting as true the factual allegations in the Melo and Gurley plaintiffs' complaints and all reasonable inferences that can be drawn therefrom, no relief can be granted under any set of facts which could be proved. See *Ransom v. Marrazzo*, 848 F.2d 398, 401 (3d Cir. 1988). For this purpose, we cannot take cognizance of the affidavits of Hafer and West denying many of the plaintiffs' factual allegations.

#### B.

##### *Individual Capacity Claim Against Hafer*

In *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304, 2312 (1989), the Supreme Court held that neither a state nor state officials sued in their official capacities for money damages are "persons" under section 1983,<sup>4</sup> and that therefore a suit brought in state court against the Michigan Director of State Police was barred. The district court, relying on *Will*, concluded that the plaintiffs have sued Hafer only in her official capacity and therefore dismissed their

4. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

section 1983 claims. On appeal, the plaintiffs contend that the district court erred as a matter of law.

The lines marking the boundaries between official and personal capacity suits have been drawn primarily in the context of Eleventh Amendment cases. That amendment has been interpreted to bar suits for monetary damages by private parties in federal court against a state or against state agencies. See *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).<sup>5</sup> It also bars a suit against state officials in their official capacity, because the state is the real party in interest inasmuch as the plaintiff seeks recovery from the state treasury. *Graham*, 473 U.S. at 165-166. In a suit against state officials in their "personal" capacity, however, where the plaintiff seeks recovery from the personal assets of the individual, the state is not the real party in interest; the suit is therefore not barred by the Eleventh Amendment. *Id.* at 165-68.

The *Will* Court's conclusion that section 1983 suits could not be brought against state officials in their official capacity followed from the Court's earlier Eleventh Amendment decisions. Although the *Will* Court did not have occasion to consider the status of personal capacity suits against state officials under section 1983, we conclude, borrowing the same Eleventh Amendment jurisprudence that the *Will* Court looked to, that because personal capacity suits against state officials are actions against the individual and not the state, state officials sued for damages in their personal capacities are "persons" under section 1983 and therefore subject to suit. See, e.g., *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 567 n.10 (1st Cir. 1989).

5. In suits for injunctive or declaratory relief, however, the Eleventh Amendment does not bar an action in which a state official is the named party. *Ex Parte Young*, 209 U.S. 123 (1908).



In determining whether plaintiffs sued Hafer in her personal capacity, official capacity, or both, we first look to the complaints and the "course of proceedings." *Graham*, 473 U.S. at 167 n.14 (quoting *Brandon v. Holt*, 469 U.S. 464, 469 (1985)); see *Gregory v. Chehi*, 843 F.2d 111, 119, (3d Cir. 1988). One of the Gurley complaints, which contains a request by six of the plaintiffs for both reinstatement and damages, explicitly specifies that plaintiffs' request for reinstatement "is asserted against the defendant in her official capacity," but that their monetary claims against Hafer "are asserted against the defendant in her personal capacity."

The *Will* opinion supports maintenance of a section 1983 claim against a state official for reinstatement. The Court, relying again on the Eleventh Amendment, stated that "a State official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Will*, 109 S.Ct. at 2311 n.10) quoting *Graham*, 473 U.S. at 167 n.14). It follows that the district court erred insofar as it dismissed the Gurley plaintiffs' claim for reinstatement against Hafer.<sup>6</sup>

As we noted above, these Gurley plaintiffs were explicit that their monetary claims were asserted against Hafer in her individual capacity. The remaining Gurley plaintiffs and the Melo plaintiffs, although not as explicit, signified a similar intent because the captions in the complaints only list "Barbara Hafer," and not the Commonwealth of Pennsylvania, as a defendant, and only request damages from Hafer and not from the state. It appears that Hafer understood that plaintiffs sought to sue her in her

6. There have been some references to arbitration proceedings initiated by plaintiffs which culminated in orders directing their reinstatement. Such awards are not relevant to the issues on appeal.

personal capacity because she raised the defense of qualified immunity throughout the course of these proceedings, a defense available only for governmental officials when they are sued in their personal, and not in their official, capacity. See *Graham*, 473 U.S. at 166-67; *Conner v. Reinhard*, 847 F.2d 384, 394 n. 8 (7th Cir.), cert. denied, 109 S.Ct. 147 (1988); *Melton v. City of Oklahoma City*, 879 F.2d 706, 727 n. 32 (10th Cir. 1989); *Lundgren v. McDaniel*, 814 F.2d 600, 604 (11th Cir. 1987).<sup>7</sup> Moreover, once plaintiffs explained in the district court that they sued Hafer for damages in her individual capacity, they should have been given leave to amend to so assert with specificity, if there was any remaining ambiguity about that issue.

The district court held that the plaintiffs only sued Hafer in her official capacity, notwithstanding their protestations to the contrary, because Hafer would not have been empowered to effectuate the removal of plaintiffs from their positions had she been acting in her personal capacity rather than in her role as Auditor General. However, the fact that Hafer's position as Auditor General cloaked her with the authority to fire the plaintiffs merely supports the undisputed proposition that she acted under color of state law in firing the plaintiffs, a prerequisite to a successful section 1983 suit. See *Robb v. City of Philadelphia*, 733 F.2d

7. A defendant being sued in his or her personal capacity should be given adequate notice that his or her personal assets are at stake. Two courts of appeals apparently require the complaint to specifically identify the capacity in which a defendant is being sued. See *Wells v. Brown*, 891 F.2d 591, 593 (6th Cir. 1989); *Nix v. Norman*, 879 F.2d 429, 431 (8th Cir. 1989). Our court has taken a more flexible approach, see *Gregory v. Chehi*, 843 F.2d at 119-20 (court "must interpret the pleading"); see also *Graham*, 473 U.S. at 167 n. 14. It is obviously preferable for the plaintiff to be specific in the first instance to avoid any ambiguity.

286, 290 (3d Cir. 1984).<sup>8</sup> It does not follow that every time a public official acts under color of state law, the suit must of necessity be one against the official in his or her official capacity. See *Graham*, 473 U.S. at 166 (to establish personal liability under section 1983 "it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right") (emphasis added).

We reject Hafer's suggestion that a state official can be sued in her personal capacity only if the allegedly unconstitutional actions were not taken in her official capacity. The Supreme Court cases expressly recognize that individual capacity suits may be brought against government officials who acted under color of state law. See, e.g., *Brandon v. Holt*, 469 U.S. 464, 472-73 (1985); *Owen v. City of Independence*, 445 U.S. 622, 637-38 (1980). In fact, underlying each of the cases considering the availability of a qualified immunity defense to a claim for damages against the state official was an individual capacity claim. See, e.g., *Malley v. Briggs*, 475 U.S. 335 (1986) (suit by arrestee against state

8. The "under color of state law" requirement, which is identical to the "state action" requirement of the Fourteenth Amendment, requires a determination of "whether there is a sufficiently close nexus between the State and the challenged action." *Johnson v. Orr*, 780 F.2d 386, 390 (3d Cir.) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)), *cert. denied*, 479 U.S. 828 (1986). There is no question that Hafer, the head of the Department of Auditor General, see, 71 Pa. Cons. Stat. § 66 (Supp. 1990), is vested under state law with the authority to hire and fire employees in the Department, thereby satisfying the "under color of state law requirement." See, e.g., 71 Pa. Cons. Stat. § 66 (Supp. 1990) (Department heads shall "exercise and perform the duties by law vested in and imposed upon the department"). The plaintiffs' allegation that Hafer misused her power in firing them does not deprive her actions of the imprimatur of state authority. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)) ("[M]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law.").

trooper); *Davis v. Scherer*, 468 U.S. 183 (1984) (suit by employee against official of state highway department); *Tower v. Glover*, 467 U.S. 914 (1984) (suit by clients against public defenders who allegedly conspired with state officials); *Procunier v. Navarette*, 434 U.S. 555 (1978) (suit by prisoner against state prison officials); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (suit by former prisoner against state prosecuting attorney).

Hafer argues that because she has final policymaking authority over hiring and firing in the Auditor General's Department, her actions leading to the firing of the plaintiffs, even if in violation of a "just cause" dismissal policy followed by previous Auditor Generals, constitutes a new state policy and therefore precludes suit against her in her personal capacity. The Second Circuit, in a persuasive opinion, has rejected a similar argument.

In *Farid v. Smith*, 850 F.2d 917 (2d Cir. 1988), an inmate filed a civil rights action against the superintendent of the correctional facility for improperly depriving him of access to certain personal materials. The court held that although the Eleventh Amendment barred suit for damages against the superintendent in his official capacity, it did not bar the inmate from pursuing the action against the superintendent in his personal capacity, even if he was following state policy when committing such acts. *Id.* at 921. *A fortiori*, a state official who herself is responsible for an unconstitutional policy would be personally liable, unless of course she is ultimately successful in her qualified immunity claim. However, disposition on qualified immunity grounds is far different from a disposition on failure to state a claim, which is what the district court did here.

In short, we hold that a section 1983 claim for reinstatement may be maintained against Hafer in her official capacity, that a damage claim under section 1983 alleging civil rights violations may be maintained against Hafer in



her individual capacity, that the allegations in the complaints adequately put her on notice of that claim, and that such a claim is not barred by the Eleventh Amendment. Just as the district court erred in dismissing the reinstatement claims because Hafer is a "person" for injunctive relief, so also the district court erred in dismissing the plaintiffs' section 1983 damage claims against Hafer individually because she is a "person" in that capacity.<sup>9</sup>

C.

#### *§ 1983 Conspiracy Claim Against West*

The section 1983 claim against West asserted by the Melo plaintiffs stands on a different footing than the claim against Hafer. We must consider whether, under the allegations of the complaint, West, who was not a state official, can be viewed to have been acting under color of state law. Because the district court only considered the allegation that West and Hafer conspired to deprive the Melo plaintiffs of their constitutional rights as a claim under 42 U.S.C. § 1985(3),<sup>10</sup> it did not reach this issue. A fair reading of the complaint shows that plaintiffs seek to assert a section 1983 claim, and West does not contend otherwise.

Maintenance of a section 1983 claim requires a showing that the defendant acted under color of state law, but the Supreme Court has held that private parties acting in a conspiracy with a state official to deprive others of

9. Hafer contends on appeal that even if we were to hold that she is being sued in her personal capacity, we should nevertheless affirm the district court's dismissal of the action, as the plaintiffs' complaints fail to state claims under either the due process clause or the First Amendment. In light of the fact that the district court did not consider these issues in the first instance, we decline to reach them on appeal.

10. The court dismissed the claim under 42 U.S.C. § 1985(3) on the ground that plaintiffs failed to allege any racial or class-based animus, as required for such a claim. See *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). The Melo plaintiffs do not challenge this ruling on appeal.

constitutional rights are also acting "under color" of state law. See *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970); *United States v. Price*, 383 U.S. 787, 794 (1966).<sup>11</sup> Consequently, such private parties can be subject to liability under section 1983. See *Adickes*, 398 U.S. at 152. It follows that federal employees who conspire with state officials to violate someone's constitutional rights are treated as acting under color of state law. See *Hampton v. Hanrahan*, 600 F.2d 600, 623 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980).<sup>12</sup>

The Melo complaint alleges that West transmitted the "jobs bought" list to Hafer when she was a candidate "with a knowledge, understanding and expectation that he would be creating a campaign issue favorable to Ms. Hafer and that Ms. Hafer, if elected, would fire all the people on the list." Melo App. at 13. Assuming *arguendo* that the alleged working relationship between Hafer and West during the fall 1988 campaign constitutes "concerted" or "joint" action sufficient to transmute West, a private actor, into one acting under color of state law, see *Robb v. City of Philadelphia*, 733 F.2d 286, 291-92 (3d Cir. 1984); *Cruz v. Donnelly*, 727 F.2d 79, 82 (3d Cir. 1984), it is insufficient in this case because Hafer was not a state actor at the time of the

11. For this purpose we assume, without deciding, that the complaint alleges the prerequisites of a civil conspiracy. See *Hampton v. Hanrahan*, 600 F.2d 600, 620-21 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980).

12. We therefore reject West's argument that private parties can be viewed as acting under color of state law only when state or municipal officials substituted the judgment of private parties for their own judgment. Although such a showing may be a basis for finding non-state officials to have been acting under color of state law, see *Robb v. City of Philadelphia*, 733 F.2d 286, 292 (3d Cir. 1984), it is not the only one. See note 13 *infra*.



alleged concerted and conspiratorial conduct.<sup>13</sup> We note that the complaint does not allege that Hafer and West conspired at any time after Hafer took office.

It is true that conspirators can be held liable for subsequent acts taken pursuant to a conspiracy, see *Hampton*, 600 F.2d at 621, and that the Melo plaintiffs have alleged that their firing after Hafer became a state official was "in the course of, in furtherance of and was the culmination of the aforesaid conspiracy." Melo App. at 18. However adequate these allegations might be, if proven, to impose liability under civil conspiracy law generally for acts subsequent to the formation of the conspiracy, they do not supply the missing link of action under color of state law.

When a private party has been held to be acting under color of state law, it has always been because of action in conjunction with an official who was then a state actor. See, e.g., *Adickes*, 398 U.S. at 149-52; *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941-42 (1982); *United Steelworkers of America v. Phelps Dodge*, 865 F.2d 1539, 1546-47 (9th Cir.) (en banc), cert. denied, 110 S.Ct. 51 (1989); *Robb*, 733 F.2d at 291-92. It is the presence of that state actor that clothes the private party with the "under color of state law" vestment. See *Adickes*, 398 U.S. at 152 ("Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute.") (quoting *Price*, 383 U.S. at 794 (1966)) (emphasis added); *Lugar*, 457 U.S. at 941 ("private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor'").

13. We focus on the alleged conspiracy because the Melo complaint provides no allegations which could satisfy the other bases for holding a private actor to possible liability under section 1983 discussed in *National Collegiate Athletic Assoc. v. Tarkanian*, 109 S.Ct. 454, 462 (1988) (state creation of legal framework governing defendant's conduct, delegation of authority to defendant, and knowing acceptance of benefits derived from the defendant's conduct).

for purposes of the Fourteenth Amendment") (emphasis added). When neither of the parties who allegedly conspired is a state official, there is no state actor to supply even a colorable basis for investing the private actor with a state mantle, even if one of the parties later becomes a state official. Plaintiffs have cited no case for such a proposition, and we see no reason to stretch the law so far. It follows that the Melo complaint failed to state a section 1983 claim against West, and the court did not err in dismissing that claim.

#### D.

##### *State Law Claims*

We turn finally to the dismissal of the state law claims. While the Melo action against West containing both federal and state law claims was pending in the district court, the government filed a scope of employment certification and motion to substitute itself for West. In doing so, the government followed the procedure established by the Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRTCA), which amended the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2670-2680 (1988).

FELRTCA was passed in response to *Westfall v. Erwin*, 484 U.S. 292 (1988), which held that a federal employee is immune only if s/he was acting within his/her scope of employment and was exercising governmental discretion. The primary purpose of FELRTCA was "to return Federal employees to the status they held prior to the *Westfall* decision," that is, a status of absolute immunity for activities within their scope of employment. See H.R. Rep. No. 100-700, 100th Cong., 2d sess., reprinted in 1988 U.S. Code Cong. & Admin. News 5945, 5947 [hereinafter H.R. Rep. No. 100-700]. To accomplish that mission, FELRTCA established an exclusively remedy against the United States for suits based on certain negligent or wrongful acts of federal employees acting within the scope of their employment,

28 U.S.C. § 2679(b)(1) (1988), and also added a statutory procedure for certification by the Attorney General to effect a substitution of the United States for its employees in cases pending in federal courts.

The relevant provision states that:

[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1) (1988).

The district court granted the United States' motion for substitution, explaining that because the government certified that West had acted within the scope of his employment,<sup>14</sup> the substitution of the government for West was "necessitated." The court then granted the United States' motion to dismiss the state law claims of defamation and contractual interference because the FTCA's waiver of tort immunity for damages "caused by the negligent or wrongful act or omission of any employee" of the federal government "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b) (1988), does not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h) (1988).

14. The United States Attorney General has delegated this certification authority to United States Attorneys in consultation with the Department of Justice. See 28 U.S.C. § 510 (1988); 28 C.F.R. § 15.3(a) (1989).

Although the district court stated that plaintiffs do not contest that West was acting within the scope of his employment when he allegedly performed the acts complained of, plaintiffs do in fact contest the accuracy of the scope of employment certification. We must thus consider whether the government's certification under 28 U.S.C. § 2679(d)(1)<sup>15</sup> is binding for purposes of substitution of the government, as the government argued in the district court and the district court held, or whether such a certification is subject to judicial review. The courts have divided on this issue. Compare *Nasuti v. Scannell*, Nos. 89-1830, 89-1831, 89-2001, slip op. at 31 (1st Cir. June 29, 1990) (judicial review of scope certification permitted); *Arbour v. Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990) (same); *Gogek v. Brown University*, 729 F. Supp. 926, 933 (D.R.I. 1990) (same); *Baggio v. Lombardi*, 726 F. Supp. 922, 925 (E.D.N.Y. 1989); *Martin v. Merriday*, 706 F. Supp. 42, 44-45 (N.D.Ga. 1989) (same); with *S.J. and W. Ranch, Inc. v. Lehtinen*, 717 F. Supp. 824, 826-27 (S.D. Fla. 1989) (no judicial review of scope certification); *Mitchell v. United States*, 709 F. Supp. 767, 768 & n.4 (W.D. Tex. 1989) (same), *rev'd on other ground*, 896 F.2d 128 (5th Cir. 1990);<sup>16</sup> see also *Mitchell v.*

15. The plaintiffs do not suggest that this section does not apply to a state law claim pendent to a federal claim filed initially in federal court. The plain statutory language covers this situation. We note that the government's certification of scope of employment was filed pursuant to 28 U.S.C. § 2679(d)(1), for purposes of substituting the United States for West in the federal action, and not pursuant to 28 U.S.C. § 2679(d)(2), to remove the state court action. West, however, had removed the action pursuant to other provisions of the United States Code.

16. Two other courts of appeals, although not directly addressing this issue, have suggested that plaintiffs may seek judicial review of certification. See *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989) ("[T]he Department of Justice has determined that [defendant] was acting within the scope of his employment, a determination which is obviously correct in light of the testimony at trial."); *Lunsford v. Price*, 885 F.2d 236, 238 n.7 (5th Cir. 1989) (noting that



*Carlson*, 896 F.2d 128, 134, 136 (5th Cir. 1990) (suggesting no judicial review of scope certification); *Aviles v. Lutz*, 887 F.2d 1046, 1049 (10th Cir. 1989) (same).

While this case was on appeal, the United States changed its position on this issue. The government now states that although the government's determination is entitled to deference, "the district court may review the Attorney General's certification that the challenged acts occurred within the scope of employment of a federal official."<sup>17</sup> In light of the division among the courts on this issue, we will analyze the issue *de novo* before establishing this court's position.

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plaintiffs did not contest certification that employees' acts were within scope of employment).

17. The relevant portion of the government's letter states:

At oral argument, the Court . . . asked the undersigned counsel whether Mr. West contended that a determination by a government agency that an employee committed an alleged tort while acting within the scope of his employment was binding and conclusive on that issue and required that the Government be substituted as defendant. Although the Government initially advanced this interpretation of the statute following enactment, upon further inquiry counsel for Mr. West has learned that the Government's current position based on the legislative history of this statute is that the Attorney General's scope of employment determination is binding only for the purpose of the removal of a suit against a federal employee to federal court under 28 U.S.C. § 2679(d)(2). With respect to whether the United States must be substituted as defendant as to tort claims raised against a federal employee, the Government's position is that, although the government's determination is entitled to deference, the district court may review the Attorney General's certification that the challenged acts occurred within the scope of employment of a federal official.

Letter from Barbara L. Herwig and Peter R. Maier, Attorneys, Appellate Staff, Civil Division (March 20, 1990).

We must first look to the language of the statute, see *United States v. James*, 478 U.S. 597, 606 (1986), and in particular to the distinction in the language between sections 2679(d)(1), governing certifications in cases filed initially in federal court, and section 2679(d)(2), authorizing the Attorney General to provide certifications for the purpose of removing actions filed in state court to federal court.<sup>18</sup> The last sentence of section 2679(d)(2) specifically provides that "[t]his certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal." 28 U.S.C. § 2679(d)(2) (emphasis added). There is no similar language of conclusiveness in section 2679(d)(1). Also, the explicit statement that the binding character of certification applies only "for purposes of removal" suggests that Congress recognized a distinction between use of the certification for removal and its use for purposes of substitution of the government as the defendant in actions filed in federal court. See *Nasuti*, Nos. 89-1830, 89-1831, 89-1001, slip op at 28-29.

There are significant policy reasons why Congress would choose to give the government an unchallengeable right to have a federal forum for tort suits brought against

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18. Section 2679(d)(2) provides in full that:

[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.



its employees. Historically, the government has generally preferred to have litigation which it or its employees are defending in the neutral confines of federal courts. For example, a similarly "absolute" right of removal is provided by 28 U.S.C. § 1442(a)(1) whenever a suit against a United States officer is filed in a state court for any act "under color of [federal] office" because, as the Supreme Court has explained, "Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum." *Willingham v. Morgan*, 395 U.S. 402, 407 (1969).

There is no suggestion in FELRTCA that once the federal forum has been secured, Congress was inclined to make the Attorney General's right to substitute the government for the employee unreviewable. In fact, Congress acknowledged the propriety of having a federal court review the scope of employment issue when the positions of the federal employee and the government conflict. Under 28 U.S.C. § 2679(d)(3) (1988), "[i]n the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment." The same provision insures a federal forum for such a judicial determination.<sup>19</sup> There is no reason why Congress would have provided employees with judicial review of the scope of employment certification decisions while denying a similar review of certification decisions to dissatisfied plaintiffs.

19. If the employee petition is filed in an action pending in state court, the action may be removed without bond by the Attorney General to the federal court for such a determination, to be remanded if the court determines that the employee was not acting within the scope of employment. 28 U.S.C. § 2679(d)(3).

The legislative history of the Act also supports our reading of FELRTCA. In discussing the exclusivity issue, the House Report noted that the Federal Drivers Act, 28 U.S.C. § 2679(b)-(e) (1982) (subsequently amended in 1988), one of the components of FTCA, provided an exclusive federal remedy when the injuries resulted from the operation of a motor vehicle by a federal employee acting within the scope of his employment. See H.R. 100-700, 1988 U.S. Code Cong. & Admin. News at 5948. The Drivers Act contained a provision for a scope of employment certification by the Attorney General for purposes of removal to federal court. Although it did not set forth any scope-of-employment certification procedures for actions filed in federal court, federal courts routinely made a determination as to whether the employee was acting within his or her scope of employment before ruling whether the action could be maintained against the government exclusively. See, e.g., *Cronin v. Hertz Corp.*, 818 F.2d 1064 (2d Cir. 1987); *Borrego v. United States*, 790 F.2d 5 (1st Cir. 1986); *Levin v. Taylor*, 464 F.2d 770 (D.C. Cir. 1972).

The extensive discussion in the House Report on the factors relevant to whether an act was within the employee's scope of employment, see H.R. Rep. No. 100-700, 1988 U.S. Code Cong. & Admin. News at 5949-50, suggests that Congress intended that the practice of court determination of the issue should be continued. Representative Frank, the sponsor of the Act, confirmed that FELRTCA was meant to ensure continuity, rather than a break, with past practice when he stated at a legislative hearing that "the plaintiff would still have the right to contest the certification if they [sic] thought the Attorney General were certifying without justification." *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary*, 100th Cong., 2d Sess. 60, 128 (April 14, 1988) (statement of Representative Frank).

Based on the language, structure, and legislative history of FELRTCA, we thus independently conclude that the district court may review the government's certification that the actions which the Melo plaintiffs allege that West took were within the scope of his employment.

It is therefore evident that we must vacate the district court's dismissal of the state law claims. The dismissals were predicated on the government's status as a defendant, which in turn is dependent on whether West was acting in the scope of employment. On remand, the parties will have an opportunity to address that issue. See 28 U.S.C. § 1346(b) (scope of employment determination under the FTCA to be made "in accordance with the law of the place where the act or omission occurred"); see also *Williams v. United States*, 350 U.S. 857 (1955) (per curiam). The district court will also have to decide which factors are relevant to that determination. The briefs of the parties have not discussed that issue.<sup>20</sup>

20. In light of our holding, we need not reach the question of whether the government, if properly substituted for West, would be able to dismiss the action because of the exception to its waiver of sovereign immunity for claims of defamation and interference with contractual relations under 28 U.S.C. § 2680(h). Compare *Mitchell*, 396 F.2d at 134-36 (plaintiff without remedies if government, as substituted party, is immune); *Aviles*, 887 F.2d at 1049-50 (same); *Sowell*, 888 F.2d at 805-06 (same); *Moreno v. Small Business Admin.*, 877 F.2d 715 (8th Cir. 1989) (same) with *Smith v. Marshall*, 885 F.2d 650, 654-56 (9th Cir. 1989) (plaintiff may proceed against individual employee if substitution of government would lead to dismissal because of government immunity under 28 U.S.C. § 2680(k)), cert. granted sub nom. *United States v. Smith*, 110 S.Ct. 2617 (1990); *Newman v. Soballe*, 871 F.2d 969, 971-73 (11th Cir. 1989) (same).

It is unclear whether a federal employee who was not acting within the scope of his employment may yet have acted under color of his office insofar as that determination will control whether he is entitled to a federal forum, see 28 U.S.C. § 1442(a)(1), and we will not attempt to answer that entirely hypothetical question (in advance of the district

## V.

## Conclusion

For the foregoing reasons, we will vacate the orders of the district court dismissing the civil rights claims as to Hafer and dismissing the Melo plaintiffs' state law claims as to West, and remand for further proceedings consistent with this opinion. We will affirm the order dismissing the Melo plaintiffs' section 1983 claim against West.

Costs to be awarded to appellants in the Gurley action. In the Melo action, appellants to bear one-third of the costs, Hafer one-third, and West one-third.

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court's ruling on the government's scope of employment certification), the parties not having even briefed this issue. The point is relevant to the motion for remand, on which the district court must rule if it determines that West was not acting within the scope of his employment. Moreover, in view of the many uncertainties and imponderables about the status of the case on remand, we leave to the district court in the first instance the question whether, if the district court determines that West was not acting in the scope of his employment, the state law claims included in the federal action should be dismissed, see *Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187 (3d Cir. 1976), because they were pendent to a federal claim against him which has been dismissed.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals  
for the Third Circuit*

**United States District Court  
For The Eastern District of Pennsylvania**

JAMES C. MELO, JR.	:	CIVIL ACTION
	:	
vs.	:	
	:	
BARBARA HAFER	:	
-and-	:	
JAMES J. WEST, ESQUIRE :		NO. 89-2935

**AMENDED COMPLAINT**

**The Parties**

1. Plaintiff is an individual who resides at 1054 Neshaminy Valley Drive, Bensalem, PA 19020. Plaintiff resides within the Eastern District of Pennsylvania.

2. Defendant Barbara Hafer ("Ms. Hafer") is the current Auditor General of the Commonwealth of Pennsylvania and maintains a regular place of business in the Office of the Auditor General, Harrisburg, PA 17120. Plaintiff does not know Ms. Hafer's resident address. Ms. Hafer also maintains regular places of business for the Office of the Auditor General throughout Pennsylvania including the Eastern District of Pennsylvania.

3. Defendant James J. West, Esquire ("Mr. West") is the United States Attorney for the Middle District of Pennsylvania and maintains a regular place of business at the Federal Building, 228 Walnut Street, Harrisburg, PA 17108. Plaintiff does not know Mr. West's resident address. The office of the United States Attorney maintains regular places of business in the Commonwealth of Pennsylvania including the Eastern District of Pennsylvania.

**Jurisdiction and Venue**

4. This is an action to redress the deprivation, under color of Pennsylvania Law, of rights and privileges secured to plaintiff by the Constitution of the United States together with pendant State Court claims. Jurisdiction arises under 42 U.S.C. 1983, 1985 and 1988 and 28 U.S.C. 1343 and pendent jurisdiction.

5. Venue is proper in the Eastern District of Pennsylvania because plaintiff resides in the Eastern District of Pennsylvania and because Mr. West is an officer or employee of the United States who was acting under color of legal authority at all times relevant hereto. Venue is also proper because Ms. Hafer maintains a regular place of business in the Eastern District as does the Office of the United States Attorney.

**Statement of Operative Facts**

6. From 1977 through January, 1989, plaintiff was continuously employed by the Commonwealth of Pennsylvania in the Office of the Auditor General as a Field Auditor. During said period of time, plaintiff received promotions and his work was at least satisfactory.

7. The position plaintiff held with the Office of the Auditor General was not that of an advisor or a formulator of plans for the implementation of broad goals. Plaintiff did not serve in a policy-making or confidential position. Party affiliation was not a necessary or appropriate requirement for the effective performance of plaintiff's duties.

8. Plaintiff had no involvement in any job buying and/or job promotion scheme in the Auditor General's Office. Plaintiff did not provide money or anything of value to any person in connection with his employment, continued employment or the promotions he received during the



course of his employment. Further, plaintiff has no knowledge that any third-person provided money or anything of value on plaintiff's behalf in connection with plaintiff's employment.

9. At some time prior to January 21, 1988, the date being unknown to plaintiff, John Kerr, a former employee of the Office of the Auditor General of Pennsylvania, and a convicted felon, stated that in 1978 he received a payment from a person other than plaintiff to influence a promotion for plaintiff. Mr. Kerr also identified approximately twenty (20) other employees of the Office of the Auditor General of Pennsylvania on whose behalf payments were made to him to influence either employment or promotions.

10. On or about January 21, 1988, Mr. West provided to Donald Bailey ("Mr. Bailey"), the then Auditor General of Pennsylvania, in a "Personal and Confidential" communication, the list of said 21 employees. A copy of said communication is attached hereto and marked Exhibit "1". Mr. West stated in Exhibit "1":

"... We can express no opinion on whether these listed individuals knew of the purchase of their jobs other than the fact that our investigation affirmatively indicates that

did not know about her job purchase ... I would request that you keep these names strictly confidential, not use them for any type of media disclosures other than necessary to appropriate administrative proceedings, and make them available only to your most trusted employees on a need-to-know basis."

11. Mr. Bailey then conducted an investigation of the said 21 employees, including plaintiff. The conclusion of the investigation was that, with regard to plaintiff, there was no evidence that he committed wrongdoing or was aware of wrongdoing committed on his behalf. Attached hereto and marked Exhibit "2" is a copy of memo of October

17, 1988 from James L. McAneny, Chief Counsel for the Auditor General, to Mr. Bailey.

12. With specific reference to plaintiff, the investigation conducted by the Office of the Auditor General failed to disclose any corroboration of the statements made by Mr. Kerr.

13. In or about April 30, 1988, Ms. Hafer was nominated by the Republican Party of Pennsylvania to be the Republican candidate for the position of Auditor General of Pennsylvania, which position was up for election in November of 1988. At approximately the same time, Mr. Bailey was nominated by the Democratic Party of Pennsylvania to be the Democratic candidate for the position of Auditor General of Pennsylvania.

14. In 1988 and 1989, Mr. West has been a registered Republican.

15. In 1988 and 1989, plaintiff has been a registered Democrat.

16. The election campaign between Ms. Hafer and Mr. Bailey for the Office of Auditor General of Pennsylvania began approximately April 30, 1988 and continued until the November, 1988 election.

17. During said election campaign, Mr. West, under color of legal authority, provided Ms. Hafer with a copy of Exhibit "1" (wherein plaintiff's name appears on the list of twenty-one (21) employees) and advised Ms. Hafer that the persons whose names appeared on the list "bought their jobs."

18. In providing the aforesaid information to Ms. Hafer and in making the statement(s) to Ms. Hafer that the persons whose names appeared on the list "bought their jobs", Mr. West was motivated by a desire to assist the Republican candidate for Auditor General in the Novem-

ber, 1988 election and to create and/or foster a campaign issue that favored Ms. Hafer.

19. In the course of her campaign, Ms. Hafer stated on numerous occasions that she had received from Mr. West a list of employees of the Office of the Auditor General of Pennsylvania who had "bought their jobs" and Ms. Hafer further stated that, if elected, she would fire all of the employees whose names appeared on the list provided by Mr. West. The issue of "list of employees bought their jobs" was a major issue in the campaign.

20. When Mr. West provided Ms. Hafer with information about the list and advised Ms. Hafer that the persons on the list had "bought their jobs," he did so with a knowledge, understanding and expectation that he would be creating a campaign issue favorable to Ms. Hafer and that Ms. Hafer, if elected, would fire all of the people on the list.

21. Ms. Hafer won the November, 1988 election and was officially inaugurated on or about January 16, 1989.

22. On February 1, 1989, Ms. Hafer fired plaintiff. Ms. Hafer issued to plaintiff and made part of plaintiff's file a firing letter dated February 1, 1989, a copy of which is attached hereto and marked Exhibit "3".

23. The reason Ms. Hafer gave for firing plaintiff was that plaintiff's firing was "necessary based on information gathered by my office as well as through cooperation with other governmental agencies as a result of an investigation of your involvement in a job buying and/or a job promotion scheme in the Auditor General's Office."

24. Plaintiff avers, upon information and belief, that on or about February 1, 1989, Ms. Hafer also fired seventeen (17) other employees whose names appeared on the list and who were then employed at the Office of the Auditor General.

25. The only people Ms. Hafer fired on February 1, 1989 were persons whose names appeared on the list provided to Ms. Hafer by Mr. West. Ms. Hafer made public statements on February 1, 1989 that she was in fact firing eighteen (18) employees of the Office of the Auditor General of Pennsylvania who had paid "up to \$5,000 each for their jobs under a previous administration." Mr. West stated on February 1, 1989 that he appreciated Ms. Hafer's definitive action in firing the eighteen (18) employees. Attached hereto and marked Exhibit "4" is a copy of an article from the February 2, 1989 edition of the Patriot-Capital News which accurately sets forth the statements made by Ms. Hafer and Mr. West on February 1, 1989 concerning the firings.

26. Subsequent to her election, neither Ms. Hafer nor anyone on her behalf or at her direction conducted any examination or investigation with regard to plaintiff's alleged involvement in a "job buying and/or job promotion scheme" in the Auditor General's Office.

27. When Ms. Hafer fired plaintiff on February 1, 1989, she did not have in her possession any more information than was in the possession of the Auditor General's office on October 17, 1988, the date of Exhibit "2."

28. The firing of plaintiff by Ms. Hafer was the culmination of joint, concerted, and conspiratorial conduct between Ms. Hafer and Mr. West to create a campaign issue which would help Ms. Hafer win the election and was the fulfillment of a campaign promise made by Ms. Hafer which was an integral part of the campaign issue and the conspiracy created by Ms. Hafer and Mr. West. Without Mr. West's participation, the issue would not have been created and plaintiff would not have been fired.

29. The personnel disciplinary powers of the department of the Auditor General are governed by the same due

process standards that control decisions by any prosecutorial or civil authority.

30. Beginning in or about January, 1986, and continuing to the present, the department of the Auditor General has maintained in full force and effect a Policy and Procedure Manual. Copies of Sections 200 and 300 of said manual are attached hereto and marked Exhibits "4" and "5" respectively. Exhibits "4" and "5" apply to position actions and separations for employees of the Office of the Auditor General, including plaintiff, and specified the circumstances under which an employee may be disciplined, demoted, suspended or dismissed.

31. Ms. Hafer did not follow, comply or conform to the Policy and Procedural Manual with regard to firing plaintiff.

### **FIRST COUNT**

#### **Plaintiff's vs. Defendants for Deprivation of Civil Rights**

32. Plaintiff re-alleges all preceding paragraphs.

33. Defendants, in connection with the firing of plaintiff on February 1, 1989, jointly and/or severally and under color of State law, subjected plaintiff and caused plaintiff to be subjected to a deprivation of the rights, privileges and immunities secured to him by the Constitution and laws of the United States.

34. In connection with firing plaintiff, Ms. Hafer did not follow, comply or conform to the Policy and Procedural Manual of the Office of Auditor General with regard to position actions and separations as well as disciplinary actions and dismissal. Plaintiff was fired without cause, without a hearing, without a reasonable pre-firing investigation and without procedural or substantive due process. Plaintiff was denied property and property rights without due process of law.

35. Plaintiff's firing was because of plaintiff's political affiliation and as a result of a purely political process. Defendants, jointly and/or severally, made plaintiff and his job a campaign issue and, because the Republican candidate won the election, plaintiff was fired. Defendants have deprived plaintiff of his right of free speech and political association.

36. When Ms. Hafer fired plaintiff, Ms. Hafer made charges against him which could seriously damage his standing and his association in his community and imposed upon plaintiff a stigma and disability that has and will foreclose plaintiff's freedom to take advantage of other employment opportunities. Defendants, during the election, and in connection with plaintiff's firing, have created and disseminated a false and defamatory impression about plaintiff. Defendants have deprived plaintiff of liberty without due process of law.

37. Ms. Hafer and Mr. West engaged in concerted and conspiratorial conduct in creating a campaign issue during the fall 1988 campaign for the Auditor General's Office wherein allegations were made by Ms. Hafer that Mr. West had provided her with a list of 21 employees who bought their jobs. In engaging in said conspiracy, Mr. West and Ms. Hafer were motivated, in whole or in part, to enable Ms. Hafer to win the election. All statements made by Ms. Hafer during the course of the campaign that persons on the list bought their jobs and all statements made by Ms. Hafer after her election in connection with the firing of said persons, including plaintiff, were made in the course of and in furtherance of the aforesaid conspiracy. The firing of plaintiff was in the course of, in furtherance of and was the culmination of the aforesaid conspiracy.

38. As a result of the deprivations of plaintiff's civil rights, as heretofore alleged, plaintiff suffered loss of employment, loss of income, loss of earning capacity, loss



of earning potential, damage to his reputation, standing and associations in his community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage. Because of emotional upset caused by his firing, plaintiff suffered an aggravation of pre-existing Crone's Disease which has caused him additional physical pain and suffering and has further caused him to incur medical expense all of which may continue into the indefinite future.

WHEREFORE, plaintiff claims compensatory damages in an amount of \$500,000.00.

## SECOND COUNT

### Plaintiff vs. Ms. Hafer and Mr. West for Conspiracy to Interfere with Civil Rights

39. Under the Penal Laws of the United States and the Commonwealth of Pennsylvania, plaintiff was not guilty of any crime in connection with his employment, continued employment or promotions with the Office of the Auditor General of Pennsylvania. Further, in accordance with the Policy Procedural Manual of the Office of the Auditor General of Pennsylvania, he was not properly the subject of discipline, demotion, suspension or dismissal. Further, by the fall of 1988, all applicable statutes

## GROEN, LAVESON, GOLDBERG, RUBENSTONE & FLAGER

By: William Goldstein,  
Esquire  
Attorney I.D. No. 12532  
One Greenwood Square  
Suite 101  
Bensalem, PA 19020  
(215) 638-9330

Counsel for plaintiff

JURY TRIAL DEMANDED

By: \_\_\_\_\_  
WILLIAM GOLDSTEIN

IN THE

## United States District Court For The Eastern District of Pennsylvania

CARL GURLEY : CIVIL ACTION  
*Plaintiff* :

vs.

BARBARA HAFER :  
*Defendant* : NO. 892685

## COMPLAINT

1. Plaintiff is an individual who resides at 1430 North Felton Street, Philadelphia, PA 19131. Plaintiff resides within the Eastern District of Pennsylvania.

2. Defendant is the duly elected Auditor General of the Commonwealth of Pennsylvania and maintains a regular place of business in the Office of the Auditor General, Harrisburg, PA, 17120. Plaintiff does not know Defendant's resident address.

3. From January, 1979 through February 21, 1989, Plaintiff was continuously employed by the Commonwealth of Pennsylvania in the Office of the Auditor General as an Investigator. During said period of time, Plaintiff received promotions and his work was uniformly rated as satisfactory or better than satisfactory.

4. From January, 1980 to February 21, 1989, Plaintiff was Special Agent in charge of the Philadelphia Office of the Auditor General's Bureau of Investigations with his office at 1400 Spring Garden Street, Philadelphia, PA, which is within the Eastern District of Pennsylvania.

5. The position Plaintiff held with the Office of the Auditor General was not that of an advisor or formulator of plans for the implementation of broad goals. Plaintiff did not serve in a policy-making or confidential position. Party affiliation was not a necessary or appropriate requirement for the effective performance of Plaintiff's duties.

6. Plaintiff is a registered Democrat and has been so registered since 1955.

7. Defendant was elected to the position of Auditor General in the November, 1988 election and assumed the duties of her office January, 1989.

8. Defendant is a registered Republican and was elected to the position of Auditor General as the Republican candidate for that position.

9. The Auditor General before Defendant was Donald Bailey ("Mr. Bailey").

10. Mr. Bailey was Defendant's opponent in the November, 1988 election and was the Democrat candidate for that office. Mr. Bailey lost the election to Defendant.

11. The personnel disciplinary powers of the Department of the Auditor General are governed by the same due

process standards that control decisions by any prosecutorial or civil authority.

12. In or about January, 1986, the Department of Auditor General promulgated Policy Procedure Manual which has continued to be in full force and effect from January, 1986 to the present. Sections 200 and 300 of said Manual apply to Position Actions and Separations and specify the circumstances under which an employee of the Office of the Auditor General may be disciplined, demoted, suspended or dismissed. Copies of Section 200 and 300 are attached hereto and marked Exhibit "1" and "2" respectively.

13. On February 21, 1989, Defendant discharged Plaintiff from employment. Defendant issued to Plaintiff and made part of Plaintiff's file a certain discharge letter dated February 21, 1989, a copy of which is attached hereto and marked Exhibit "3".

14. The Defendant has provided Plaintiff with no reason for his discharge.

## **FIRST COUNT**

### **Deprivation of Due Process**

15. Plaintiff re-alleges all preceding paragraphs.

16. When Defendant fired Plaintiff on or about February 21, 1989, Defendant, under color of law of the Commonwealth of Pennsylvania, subjected Plaintiff, a citizen of the United States to a deprivation of the rights, privileges and immunities secured by the Constitution and laws of the United States.

17. Defendant did not follow, comply or conform to the Policy and Procedure Manual of the Department of the Auditor General with regard to position actions and separations as well as disciplinary actions and dismissal.

18. Defendant denied Plaintiff property and property rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and as guaranteed by the Federal Civil Rights Act, 42 U.S. Code, Section 1983.

19. As a result of the deprivations of Plaintiff's civil rights, as heretofore alleged, Plaintiff suffered loss of employment, loss of income, loss of earning capacity, loss of earning potential, damage to his reputation, standing and associations in his community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage.

WHEREFORE, Plaintiff claims compensatory damages against Defendant for monetary losses and physical and emotional pain and suffering of \$500,000.00.

## SECOND COUNT

### Deprivation of Freedom of Speech

20. Plaintiff re-alleges all preceding paragraphs.

21. Defendant fired Plaintiff because of Plaintiff's political affiliation to wit, the Plaintiff was a Democrat. In so doing Defendant caused Plaintiff to be deprived of his right to free speech in violation of the First Amendment to the Constitution of the United States and as guaranteed by the Federal Civil Rights Act, 42 U.S. Code, Section 1983.

22. As a result of the deprivations of Plaintiff's civil rights, as heretofore alleged, Plaintiff suffered loss of employment, loss of income, loss of earning capacity, loss of earning potential, damage to his reputation, standing and associations in his community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage.

WHEREFORE, Plaintiff claims compensatory damages against Defendant for monetary losses and physical and emotional pain and suffering of \$500,000.00.

## THIRD COUNT

### Punitive Damages

23. Plaintiff re-alleges all preceding paragraphs.

24. When Defendant fired Plaintiff, Defendant was motivated by an evil motive and evil intent and acted with reckless and callous indifference to Plaintiff's federally protected rights. Defendant acted in bad faith, without reasonable cause, and in wanton disregard for Plaintiff's Constitutional rights. Defendant maliciously made charges stigmatizing Plaintiff's reputation.

WHEREFORE, Plaintiff claims punitive damages of Defendant in the amount of \$500,000.00.

## FOURTH COUNT

### Counsel Fees

25. Plaintiff re-alleges all preceding paragraphs.

26. Pursuant to the Federal Civil Rights Act, 42 U.S. Code, Section 1988, Plaintiff requests that the Court award and direct Defendant to pay Plaintiff's reasonable attorney's fees.

WHEREFORE, Plaintiff claims of Defendant reasonable attorney fees in an amount not yet determined.

Groen, Laveson, Goldberg,  
Rubenstone & Flager

By: \_\_\_\_\_  
WILLIAM GOLDSTEIN, ESQUIRE

Dated: \_\_\_\_\_



A-44

LAW OFFICES  
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ERIC P. ROTHBERG

DAVID C. RAY

B. ADAM SAGAN▲

April 25, 1989

SUSAN B. LEVY\*

\*MEMBER OF PA & NJ BARS

▲MEMBER OF PA, NJ & DC BARS

The Honorable Barbara Hafer  
OFFICE OF THE AUDITOR GENERAL  
Finance Building  
Room 229  
Harrisburg, PA 17120

RE: James C. Melo, Jr. vs.  
Barbara Hafer and James J. West, Esquire  
C.A. No. 89-2935

Dear Madam Hafer:

We represent James C. Melo, Jr. in the captioned matter.

I enclose copy of Complaint which has been filed in the United States District Court for the Eastern District of Pennsylvania. I also enclose copy of Summons which noti-

A-45

fies you of your obligation to file an Answer to the Complaint within twenty (20) days of service of the Summons. I also enclose Civil Forms 635 and 652. Form 635 advises you of your right to consent to disposition of the case by a United States magistrate and Form 652 is an Acknowledgement of Receipt of Summons and Complaint. The bottom half of Form 652 is to be completed by you and returned to me in the envelope enclosed for that purpose.

Very truly yours,

WILLIAM GOLDSTEIN

WG:es

Enclosures

CERTIFIED MAIL/RETURN RECEIPT REQUESTED

**SUMMONS IN A CIVIL ACTION****UNITED STATES  
DISTRICT COURT****District  
EASTERN DISTRICT  
OF PENNSYLVANIA**

JAMES C. MELO, JR.

: Docket No.  
: C.A. 89-2935

v.

BARBARA HAER

: To: (Name and Address of Defendant)

and

JAMES J. WEST, ESQUIRE

: Barbara Haer  
: Office of the Auditor  
: General  
: Finance Building, Room 229  
: Harrisburg, PA 17120**YOU ARE HEREBY SUMMONED and required  
to serve upon**

---

**Plaintiff's Attorney (Name and Address)**William Goldstein, Esq.  
GROEN, LAVESON, GOLDBERG, RUBENSTONE &  
FLAGER  
One Greenwood Square  
Suite 101  
Bensalem, PA 19020an answer to the complaint which is herewith served upon  
you, within 20 days after service of this summons upon  
you, exclusive of the day of service. If you fail to do so,judgment by default will be taken against you for the relief  
demanded in the complaint.Clerk MICHAEL E. KUNZDate 4/21/89(By) Joan Blumenthal

Deputy Clerk

IN THE  
**United States District Court  
 For the Eastern District  
 of Pennsylvania**

JAMES C. MELO, JR. : Civil Action No. 89-2935  
 :  
 VS. :  
 :  
 BARBARA HAFFER : NOTICE OF ACKNOWLEDGEMENT OF RECEIPT  
 and : OF SUMMONS AND  
 JAMES J. WEST, ESQUIRE : COMPLAINT

**NOTICE**

TO: The Honorable Barbara Hafer  
 (Name)  
Office of the Auditor General  
Finance Building, Room 229  
 (Street)  
Harrisburg, PA 17120  
 (City and State)

The enclosed summons and complaint are served pursuant to Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure.

You must complete the acknowledgement part of this form and return one copy of the completed form to the sender within 20 days.

You must sign and date the acknowledgement. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and

you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 20 days, you (or the party on whose behalf you are being served) may be required to pay any expense incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within 20 days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice of Acknowledgement of Receipt of Summons and Complaint was mailed on April 25, 1989.

April 25, 1989

(Date of Signature)

**ACKNOWLEDGEMENT OF RECEIPT  
 OF SUMMONS AND COMPLAINT**

I declare, under penalty of perjury, that I received a copy of the summons and of the complaint in the above-captioned matter at \_\_\_\_\_

(insert address)

\_\_\_\_\_  
 (Signature)

\_\_\_\_\_  
 (Relationship to Entity/Authority to  
 Receive Service of Process)

\_\_\_\_\_  
 (Date of Signature)



**United States District Court  
For the Eastern District  
of Pennsylvania**

JAMES C. MELO, JR. : Civil Action No. 89-2935  
                           *Plaintiff* :  
                           v. :  
 BARBARA HAFER : JURY TRIAL DEMANDED  
                           and :  
 JAMES J. WEST, ESQUIRE :  
                           *Defendants.* :

**ANSWER AND COUNTERCLAIM  
OF DEFENDANT BARBARA HAFER**

1. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted in part, denied in part. It is admitted that plaintiff was an employee of the Auditor General's Office from 1977 to 1989 but the remaining averments of this paragraph are denied because defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of these averments.

7. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment.

8. Denied. It is averred on information and belief that plaintiff's promotion to Field Auditor III was purchased by virtue of a payment made by "Reds" Barbone to John Kerr, a former employee of the Department of Auditor General of Pennsylvania and a convicted felon, currently serving time in prison for his related, unlawful activities.

9. Admitted.

10. Admitted.

11. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment. By way of further answer, defendant Hafer states that this so called "investigation" was delegated by Mr. Bailey to James L. McAneny, who performed said "investigation" despite a conflict of interest arising from his prior association with the law office of Calvin Lieberman, at the same time that Lieberman represented John Kerr in the criminal investigation of Kerr for the job-buying scheme in the Auditor General's Office for which Kerr eventually went to prison and McAneny's participation in the cover-up of this job-buying scheme which occurred during the Benedict administration.

12. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment.

13. Admitted.

14. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment.

15. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment.

16. Admitted.

17. Denied. Mr. West did not provide defendant Hafer with any such list prior to defendant Hafer's inauguration as Auditor General.

18. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment. By way of further answer, defendant Hafer denies that such list was provided prior to her inauguration.

19. Denied.

20. Denied. Defendant Hafer received no such list or information.

21. Admitted.

22. Admitted.

23. Admitted.

24. Admitted.

25. Denied.

26. Denied. Subsequent to the election defendant Hafer and representatives from her office conducted an investigation in regard to the job-buying scheme.

27. Denied. By way of further answer, defendant Hafer avers that she had in her possession on February 1, 1989, extensive information learned as a result of the investigation referred to in paragraph 26.

28. Denied. The firing of plaintiff was not the result of joint, concerted and conspiratorial conduct between defendant Hafer and defendant West to create a campaign issue but instead, was the result of an investigation and a commitment to eliminate all public employees who had purchased their jobs as a result of the illegal job-buying scheme for which Benedict and Kerr are serving prison terms.

29. Denied as a conclusion of law to which no responsive pleading is required.

30. Admitted in part, denied in part. It is admitted in part that the Department of Auditor General has a policy procedure manual, copies of various sections of which were attached to the plaintiff's complaint. It is denied as a conclusion of law to which no responsive pleading is required that this manual provides the sole mechanism for disciplining, demoting or suspending employees.

31. Denied as a conclusion of law to which no responsive pleading is required. It is further denied because at all times, defendant Hafer complied with the requirements of due process and all applicable laws and regulations.

32. N/A.

33. Denied as a conclusion of law to which no responsive pleading is required.

34. Denied as a conclusion of law to which no responsive pleading is required.

35. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, defendant Hafer denies that plaintiff's firing was because of political affiliation as defendant Hafer was unaware of plaintiff's political affiliation.

36. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, defendant Hafer did not disseminate any statement identifying plaintiff.

37. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, defendant Hafer engaged in no conspiracy with Mr. West, was not provided with a list of names prior to her inauguration as Auditor General and at all times, acted solely in the public interest.

38. Denied. Defendant Hafer did not deprive plaintiff of his civil rights. Defendant is without sufficient knowledge to form a belief as to the truth or falsity of the remaining averments of this paragraph.

39. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, defendant Hafer avers that plaintiff was properly the subject of discipline, demotion, suspension and/or dismissal because his job was purchased as part of the job-buying scheme for which former Auditor General Benedict and his deputy John Kerr have gone to prison.

40. Denied. Defendant Hafer did not act in concert or conspire with anyone to impede, hinder, obstruct and/or defeat the due course of justice by dismissing plaintiff or any other employees following her inauguration as Auditor General. Defendant Hafer fired employees whose jobs were purchased as part of the job-buying scheme and these dismissals complied with due process and all applicable regulations.

41. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment.

42. N/A.

43. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, defendant Hafer avers that the firing of plaintiff was not motivated by an evil motive or intent and was not in wanton disregard of plaintiff's constitutional rights but was part of defendant Hafer's efforts to remove persons from the office of Auditor General who had purchased their jobs as part of the illegal job-buying scheme.

44. N/A.

45. Denied as a conclusion of law to which no responsive pleading is required.

46. N/A.

47. N/A.

48. N/A.

49. N/A.

50. N/A.

51. N/A.

52. N/A.

53. N/A.

54. N/A.

55. N/A.

56. N/A.

57. N/A.

58. N/A.

59. N/A.

60. N/A.

61. N/A.

### AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted.

2. Plaintiff's claims are barred by the doctrines of waiver and estoppel.

3. Plaintiff failed to mitigate his damages.

4. Plaintiff's punitive damage claims are invalid and improper and violate the United States and Pennsylvania Constitutions.

5. Plaintiff's claims are barred by the doctrine of unclean hands.



6. Plaintiff's claims are barred by the Eleventh Amendment.

7. Plaintiff's claims are barred by the doctrine of qualified immunity.

8. Plaintiff's claims are barred by the doctrine of exhaustion and remedies.

9. Plaintiff's claims are barred because plaintiff was provided with sufficient due process by virtue of the procedures provided by applicable laws and regulations pertaining to employees of the Auditor General.

10. Plaintiff's claims are barred for lack of jurisdiction.

11. Plaintiff's claims are barred because service of process was improper.

WHEREFORE, defendant Hafer requests that the Complaint be dismissed with prejudice and judgment be entered in favor of defendant Hafer.

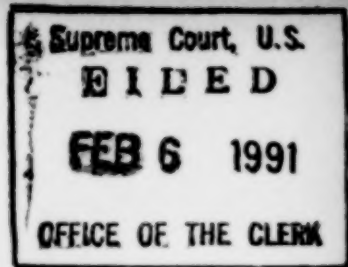
### **COUNTERCLAIM**

Defendant and counterclaim-plaintiff, Barbara Hafer, through her undersigned attorneys, hereby counterclaims against James Melo, plaintiff and counterclaim-defendant.

1. Counterclaim-plaintiff repeats and realleges each of the admissions, denials and averments set forth in the foregoing answer as if they had been set forth herein in their entirety.

(3)

No. 90-681



IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1990

BARBARA HAFER,

*Petitioner*

*v.*

JAMES C. MELO, JR. AND CARL GURLEY, ET AL.,

*Respondents*

**RESPONSE TO ANSWER TO  
PETITION FOR WRIT OF CERTIORARI**

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*Counsel for Petitioner*

No. 90-681

---

IN THE  
SUPREME COURT OF THE UNITED STATES

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October Term, 1990

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BARBARA HAER,

*Petitioner*

v.

JAMES C. MELO, JR. AND CARL GURLEY, ET AL.,

*Respondents*

---

**RESPONSE TO ANSWER TO  
PETITION FOR WRIT OF CERTIORARI**

---

Respondents' Answer fails to meet the principal arguments presented in support of petitioner's request for a Writ of Certiorari.

1. *The decision of the Court of Appeals* that petitioner, Barbara Haer, was subject to suit under 42 U.S.C. §1983 for actions taken in her official capacity as Auditor General of the Commonwealth of Pennsylvania in firing respondents, is *contrary to the express holding of this Court in Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304, 2312 (1989), that "... neither a State nor its officials *acting in their official capacities* are 'persons' under Section 1983." (Emphasis added.) It is therefore not relevant that the Court of Appeals for the Third Circuit was, as characterized by respondents (Answer, p. 3-4),



"satisfied that [respondents] had adequately explained to the District Court that their claims for monetary damages were asserted against [petitioner] in her individual capacity only." In fact, the District Court was not persuaded that respondents' claims were against petitioner in her individual capacity and held, to the contrary, that respondents' actions were against petitioner for acting in her official capacity.

2. State officials, as the States themselves, should not be subject to threats of law suits under 42 U.S.C. §1983 to recover monetary damages in connection with their conduct in the management of state governments, particularly acts relating to the discharge of state employees involved in an illegal job-buying scheme. The State can only act through its elected and appointed officials, and the possibility of being required to expend personal funds in defending charges arising out of conduct necessary to the efficient management of the State would have a decided chilling effect upon the good faith exercise by these persons of their governmental functions and would discourage the effectuation of appropriate employment standards.

Any infringement by a State of the rights protected by 42 U.S.C. §1983 in the management of its affairs can be remedied by the grant of prospective relief. There is no necessity to penalize the State officials through whom the State must act.

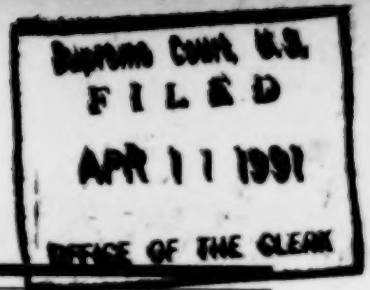
A Writ of Certiorari should be issued to the United States Court of Appeals for the Third Circuit to settle this important issue of Federal-State relations.

Respectfully submitted,

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(12)  
No. 90-681



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

BARBARA HAFFER,

*Petitioner*

v.

JAMES C. MELO, JR. AND CARL GURLEY, ET AL.,

*Respondents*

On Writ of Certiorari to the United States Court  
of Appeals for the Third Circuit

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**JOINT APPENDIX**

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Petition for Certiorari filed October 26, 1990  
Certiorari granted February 25, 1991

253942

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ET AL. VS. BARBARA HAFFER AND JAMES J. WEST,  
ESQ., U.S.D.C., E.D.PA. C. A. NO. 89-2935**

April 21, 1989	Complaint, filed
May 2, 1989	Summons and affidavit returned by William Goldstein, Esq. re: served defts on 4/27/89 by cert. mail, filed
May 19, 1989	Amended Complaint, filed
June 15, 1989	Barbara Hafer's Answer and Counterclaim, filed
July 14, 1989	Order that Defts Motion for Summary Judgment will be filed by 8/9/89, Joint Discovery Schedule Deferred, filed 7/14/89 entered
July 18, 1989	Order that this action is consolidated with 89-4033, 89-4034, 89-4035, 89-4036, 89-4037, 89-4038, 89-4133 for all pretrial purposes; and these cases are marked closed for statistical purposes and all papers shall be filed under 89-2935, filed, 17/18/89 entered
July 28, 1989	James J. West's Motion to Dismiss the Complaint or in the Alternative, for Summary Judgment, Brief, Cert. of Service, filed
July 28, 1989	Govt's Motion to Substitute in Place of James J. West on Counts Five and Six of the Amended Complaint and to Dismiss the Complaint, Brief, Cert. of Service, filed
August 9, 1989	Barbara Hafer's Motion to File a Consolidated Motion for Summary Judgment, Memo, Cert. of Service, filed
August 9, 1989	Barbara Hafer's Motion for Summary Judgment, Memo, Cert. of Service, filed

August 11, 1989 Order that Barbara Hafer's Motion to File a Consolidated Motion for Summary Judgment is Granted, filed 8/11/89 entered

August 18, 1989 Plaintiffs Answer to Motion of U.S. of America to Substitute in Place of James J. West on Counts V and VI of the Amended Complaint and to Dismiss the Complaint. Memo, Cert. of Service, filed

August 18, 1989 Plaintiffs Answer to Motion of Defendant James J. West to Dismiss the Complaint or, In the Alternative, for Summary Judgment, Memo., Declarations and Cert. of Service, filed

August 31, 1989 Plaintiffs Answer to Motion for Summary Judgments of Barbara Hafer, Memo, filed

September 28, 1989 Order the Defendants Motion for Summary Judgment is Granted, Actions 89-2935 and 89-2685 are Dismissed with Prejudice, filed Entered 9/28/89

September 28, 1989 Order that Gov'ts Motion to Substitute is Granted, and Counts V and VI of the Amended Complaint are Dismissed, filed - 9/28/89 - Entered

September 28, 1989 Order that James J. West's Motion for Summary Judgment is Moot, filed 9/28/89 Entered

October 18, 1989 Memorandum and order re: Motion for Summary Judgment, filed 10/28/89 Entered

October 25, 1989 Plaintiffs Notice of Appeal, filed 10/26/89 Entered.

**RELEVANT DOCKET ENTRIES IN CARL GURLEY,  
ET AL. VS. BARBARA HAFER, U.S.D.C., E.D.PA.  
C. A. NO. 89-2685**

April 13, 1989 Complaint, filed

June 15, 1989 Answer, filed

July 14, 1989 Order that Defts Motion for Summary Judgment Will Be Filed by 8/9/89, Joint Discovery Scheduled Deferred, filed 7/14/89 Entered

July 18 1989 Order that this Action and 89-3847 and 89-4950 are Consolidated for all Pretrial Purposes, Actions 89-3847 and 89-4950 are marked closed for statistical purposes, all papers shall be filed in 89-2685, filed 7/19/89 Entered

August 9, 1989 Barbara Hafer's Motion to File a Consolidated Motion for Summary Judgment, Memo, Cert. of Service, filed

August 9, 1989 Barbara Hafer's Motion for Summary Judgment, Memo, Cert. of Service, filed

August 11, 1989 Order that Barbara Hafer's Motion to File a Consolidated Motion for Summary Judgment is Granted, filed 9/11/89 Entered

August 31, 1989 Plaintiffs Answer to Motion for Summary Judgment of Barbara Hafer, Memo filed

September 28, 1989 Order that Defts Motion for Summary Judgment is Granted, Actions 89-2935 and 89-2685 are Dismissed with Prejudice, filed 9/28/89 Entered

October 18, 1989 Memorandum and Order re: Motion for Summary Judgment, filed 10/19/89 Entered

October 25, 1989 Plffs Notice of Appeal, filed 10/26/89 Entered



**RELEVANT DOCKET ENTRIES IN JAMES C. MELO, JR.,  
ET AL. VS. BARBARA HAFER AND JAMES C. WEST,  
U.S.C.A. 3d Cir., No. 89-1924**

December 19, 1989 Motion by aplee, Hafer for leave to file  
suppl. apx w/aplee West, filed. (dr)

December 28, 1989 Order (Clerk) granting above motion,  
Aplees are granted leave to file suppl apx  
at time their briefs are due, filed. (dr)

December 19, 1989 Motion by aplee Hafer to consolidate  
appeals, filed. (dr) (Cvs. 89-1924 & 89-  
1925)

December 28, 1989 Order (Clerk) granting above motion,  
Appeals are consolidated for briefing and  
disposition, filed. (dr) (Cvs. 89-1924 &  
89-1925)

January 30, 1990 Aplt's motion for leave to file a supple-  
mental appendix, filed (baw) (cvs. 89-  
1924/1925) **SENT TO MERITS PANEL**

February 1, 1990 Order (Clerk) referring aplt's motion for  
leave to file a supplemental appendix to  
the merits panel, filed (baw) (cvs.  
89-1924/1925).  
**SENT TO MERITS PANEL (for info)**

September 27, 1990 Motion of Aplee, Hafer, to Stay Man-  
date, w/serv. fld. (bj) (cvs. (89-1924/25)

October 1, 1990 Aplt's Answer in Opposition to Motion  
of Apee, Hafer's Stay of Mandate,  
w/serv., fld. (bj) (cvs. 89-1924/25)

October 3, 1990 Order (Sloviter, CJ) granting the above  
motion, to & includ. Oct. 28, 1990, fld.  
(bj) (cvs. 89-1924/25)

**RELEVANT DOCKET ENTRIES IN CARL GURLEY, ET  
AL. VS. BARBARA HAFER, U.S.C.A. 3d Cir., No. 89-1925**

December 19, 1989 Motion by aplee Hafer to consolidate  
appeals, filed. (dr) (Cvs. 89-1924 & 89-  
1925)

December 28, 1989 Order (Clerk) granting above motion,  
Appeals are consolidated for further  
briefing & disposition, filed. (dr) (Cvs.  
89-1924 & 89-1925)

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date, w/serv. fld. (bj) (Cvs. 89-1924/25)

October 1, 1990 Aplt's Answer in Opposition to Motion  
of Aplee, Hafer's Stay of Mandate,  
w/serv., fld. (bj) (Cvs. 89-1924/25)

October 3, 1990 Order (Sloviter, CJ) granting the above  
otion, to & includ. Oct. 28, 1990, fld. (bj)  
(Cvs. 89-1924/25)

The following opinions, judgments and orders have been omitted in printing this joint appendix because they appear in the following pages of the appendix to the printed Petition for Certiorari:

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Order of the United States Court of Appeals Denying Petition for Rehearing, entered September 21, 1990	A-32
Order of the United States District Court for the Eastern District of Pennsylvania, granting Motion for Summary Judgment, entered September 28, 1989 .....	A-33
Memorandum Opinion of the United States District Court for the Eastern District of Pennsylvania, entered October 19, 1989 .....	A-36

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JAMES C. MELO, JR.	:	CIVIL ACTION
	:	
<i>Plaintiff,</i>	:	
vs.	:	
	:	
BARBARA HAFER	:	
and	:	
JAMES J. WEST, ESQUIRE	:	
<i>Defendants.</i>	:	NO. 89-2935

**AMENDED COMPLAINT**

*The Parties*

1. Plaintiff is an individual who resides at 1054 Neshaminy Valley Drive, Bensalem, PA 19020. Plaintiff resides within the Eastern District of Pennsylvania.

2. Defendant Barbara Hafer ("Ms. Hafer") is the current Auditor General of the Commonwealth of Pennsylvania and maintains a regular place of business in the Office of the Auditor General, Harrisburg, PA 17120. Plaintiff does not know Ms. Hafer's resident address. Ms. Hafer also maintains regular places of business for the Office of the Auditor General throughout Pennsylvania including the Eastern District of Pennsylvania.

3. Defendant James J. West, Esquire ("Mr. West") is the United States Attorney for the Middle District of Pennsylvania and maintains a regular place of business at the Federal Building, 228 Walnut Street, Harrisburg PA 17108. Plaintiff does not know Mr. West's resident address. The office of the United States Attorney maintains regular places of business in the Commonwealth of Pennsylvania including the Eastern District of Pennsylvania.

*Jurisdiction and Venue*

4. This is an action to redress the deprivation, under color of Pennsylvania Law, of rights and privileges secured to plaintiff by the Constitution of the United States together with pendant

State Court claims. Jurisdiction arises under 42 U.S.C. 1983, 1985 and 1988 and 28 U.S.C. 1343 and pendent jurisdiction.

5. Venue is proper in the Eastern District of Pennsylvania because plaintiff resides in the Eastern District of Pennsylvania and because Mr. West is an officer or employee of the United States who was acting under color of legal authority at all times relevant hereto. Venue is also proper because Ms. Hafer maintains a regular place of business in the Eastern District as does the Office of the United States Attorney.

#### *Statement of Operative Facts*

6. From 1977 through January, 1989, plaintiff was continuously employed by the Commonwealth of Pennsylvania in the Office of the Auditor General as a Field Auditor. During said period of time, plaintiff received promotions and his work was at least satisfactory.

7. The position plaintiff held with the Office of the Auditor General was not that of an advisor or a formulator of plans for the implementation of broad goals. Plaintiff did not serve in a policy-making or confidential position. Party affiliation was not a necessary or appropriate requirement for the effective performance of plaintiff's duties.

8. Plaintiff had no involvement in any job buying and/or job promotion scheme in the Auditor General's Office. Plaintiff did not provide money or anything of value to any person in connection with his employment, continued employment or the promotions he received during the course of his employment. Further, plaintiff has no knowledge that any third-person provided money or anything of value on plaintiff's behalf in connection with plaintiff's employment.

9. At some time prior to January 21, 1988, the date being unknown to plaintiff, John Kerr, a former employee of the Office of the Auditor General of Pennsylvania, and a convicted felon, stated that in 1978 he received a payment from a person other than plaintiff to influence a promotion for plaintiff. Mr. Kerr also identified approximately twenty (20) other employees of the

Office of the Auditor General of Pennsylvania on whose behalf payments were made to him to influence either employment or promotions.

10. On or about January 21, 1988, Mr. West provided to Donald Bailey ("Mr. Bailey"), the then Auditor General of Pennsylvania, in a "Personal and Confidential" communication, the list of said 21 employees. A copy of said communication is attached hereto and marked Exhibit "1". Mr. West stated in Exhibit "1":

"... We can express no opinion on whether these listed individuals knew of the purchase of their jobs other than the fact that our investigation affirmatively indicates that

did not know about her job purchase . . . . I would request that you keep these names strictly confidential, not use them for any type of media disclosures other than necessary to appropriate administrative proceedings, and make them available only to your most trusted employees on a need-to-know basis."

11. Mr. Bailey then conducted an investigation of the said 21 employees, including plaintiff. The conclusion of the investigation was that, with regard to plaintiff, there was no evidence that he committed wrongdoing or was aware of wrongdoing committed on his behalf. Attached hereto and marked Exhibit "2" is a copy of memo of October 17, 1988 from James L. McAneny, Chief Counsel for the Auditor General, to Mr. Bailey.

12. With specific reference to plaintiff, the investigation conducted by the Office of the Auditor General failed to disclose any corroboration of the statements made by Mr. Kerr.

13. In or about April 30, 1988, Ms. Hafer was nominated by the Republican Party of Pennsylvania to be the Republican candidate for the position of Auditor General of Pennsylvania, which position was up for election in November of 1988. At approximately the same time, Mr. Bailey was nominated by the Democratic Party of Pennsylvania to be the Democratic candidate for the position of Auditor General of Pennsylvania.



14. In 1988 and 1989, Mr. West has been a registered Republican.

15. In 1988 and 1989, plaintiff has been a registered Democrat.

16. The election campaign between Ms. Hafer and Mr. Bailey for the Office of Auditor General of Pennsylvania began approximately April 30, 1988 and continued until the November, 1988 election.

17. During said election campaign, Mr. West, under color of legal authority, provided Ms. Hafer with a copy of Exhibit "1" (wherein plaintiff's name appears on the list of twenty-one (21) employees) and advised Ms. Hafer that the persons whose names appeared on the list "bought their jobs."

18. In providing the aforesaid information to Ms. Hafer and in making the statement(s) to Ms. Hafer that the persons whose names appeared on the list "bought their jobs", Mr. West was motivated by a desire to assist the Republican candidate for Auditor General in the November, 1988 election and to create and/or foster a campaign issue that favored Ms. Hafer.

19. In the course of her campaign, Ms. Hafer stated on numerous occasions that she had received from Mr. West a list of employees of the Office of the Auditor General of Pennsylvania who had "bought their jobs" and Ms. Hafer further stated that, if elected, she would fire all of the employees whose names appeared on the list provided by Mr. West. The issue of "list of employees bought their jobs" was a major issue in the campaign.

20. When Mr. West provided Ms. Hafer with information about the list and advised Ms. Hafer that the persons on the list had "bought their jobs," he did so with a knowledge, understanding and expectation that he would be creating a campaign issue favorable to Ms. Hafer and that Ms. Hafer, if elected, would fire all of the people on the list.

21. Ms. Hafer won the November, 1988 election and was officially inaugurated on or about January 16, 1989.

22. On February 1, 1989, Ms. Hafer fired plaintiff. Ms. Hafer issued to plaintiff and made part of plaintiff's file a firing letter dated February 1, 1989, a copy of which is attached hereto and marked Exhibit "3."

23. The reason Ms. Hafer gave for firing plaintiff was that plaintiff's firing was "necessary based on information gathered by my office as well as through cooperation with other governmental agencies as a result of an investigation of your involvement in a job buying and/or a job promotion scheme in the Auditor General's Office."

24. Plaintiff avers, upon information and belief, that on or about February 1, 1989, Ms. Hafer also fired seventeen (17) other employees whose names appeared on the list and who were then employed at the Office of the Auditor General.

25. The only people Ms. Hafer fired on February 1, 1989 were persons whose names appeared on the list provided to Ms. Hafer by Mr. West. Ms. Hafer made public statements on February 1, 1989 that she was in fact firing eighteen (18) employees of the Office of the Auditor General of Pennsylvania who had paid "up to \$5,000 each for their jobs under a previous administration." Mr. West stated on February 1, 1989 that he appreciated Ms. Hafer's definitive action in firing the eighteen (18) employees. Attached hereto and marked Exhibit "4" is a copy of an article from the February 2, 1989 edition of the Patriot-Capital News which accurately sets forth the statements made by Ms. Hafer and Mr. West on February 1, 1989 concerning the firings.

26. Subsequent to her election, neither Ms. Hafer nor anyone on her behalf or at her direction conducted any examination or investigation with regard to plaintiff's alleged involvement in a "job buying and/or job promotion scheme" in the Auditor General's Office.

27. When Ms. Hafer fired plaintiff on February 1, 1989, she did not have in her possession any more information than was in the possession of the Auditor General's office on October 17, 1988, the date of Exhibit "2."

28. The firing of plaintiff by Ms. Hafer was the culmination of joint, concerted, and conspiratorial conduct between Ms. Hafer and Mr. West to create a campaign issue which would help Ms. Hafer win the election and was the fulfillment of a campaign promise made by Ms. Hafer which was an integral part of the campaign issue and the conspiracy created by Ms.

Hafer and Mr. West. Without Mr. West's participation, the issue would not have been created and plaintiff would not have been fired.

29. The personnel disciplinary powers of the department of the Auditor General are governed by the same due process standards that control decisions by any prosecutorial or civil authority.

30. Beginning in or about January, 1986, and continuing to the present, the department of the Auditor General has maintained in full force and effect a Policy and Procedure Manual. Copies of Sections 200 and 300 of said manual are attached hereto and marked Exhibits "4" and "5" respectively. Exhibits "4" and "5" apply to position actions and separations for employees of the Office of the Auditor General, including plaintiff, and specified the circumstances under which an employee may be disciplined, demoted, suspended or dismissed.

31. Ms. Hafer did not follow, comply or conform to the Policy and Procedural Manual with regard to firing plaintiff.

### FIRST COUNT

#### *Plaintiff's vs. Defendants for Deprivation of Civil Rights*

32. Plaintiff re-alleges all preceding paragraphs.

33. Defendants, in connection with the firing of plaintiff on February 1, 1989, jointly and/or severally and under color of State law, subjected plaintiff and caused plaintiff to be subjected to a deprivation of the rights, privileges and immunities secured to him by the Constitution and laws of the United States.

34. In connection with firing plaintiff, Ms. Hafer did not follow, comply or conform to the Policy and Procedural Manual of the Office of Auditor General with regard to position actions and separations as well as disciplinary actions and dismissal. Plaintiff was fired without cause, without a hearing, without a reasonable pre-firing investigation and without procedural or substantive due process. Plaintiff was denied property and property rights without due process of law.

35. Plaintiff's firing was because of plaintiff's political affiliation and as a result of a purely political process. Defendants, jointly and/or severally, made plaintiff and his job a campaign

issue and, because the Republican candidate won the election, plaintiff was fired. Defendants have deprived plaintiff of his right of free speech and political association.

36. When Ms. Hafer fired plaintiff, Ms. Hafer made charges against him which could seriously damage his standing and his associations in his community and imposed upon plaintiff a stigma and disability that has and will foreclose plaintiff's freedom to take advantage of other employment opportunities. Defendants, during the election, and in connection with plaintiff's firing, have created and disseminated a false and defamatory impression about plaintiff. Defendants have deprived plaintiff of liberty without due process of law.

37. Ms. Hafer and Mr. West engaged in concerted and conspiratorial conduct in creating a campaign issue during the fall 1988 campaign for the Auditor General's Office wherein allegations were made by Ms. Hafer that Mr. West had provided her with a list of 21 employees who bought their jobs. In engaging in said conspiracy, Mr. West and Ms. Hafer were motivated, in whole or in part, to enable Ms. Hafer to win the election. All statements made by Ms. Hafer during the course of the campaign that persons on the list bought their jobs and all statements made by Ms. Hafer after her election in connection with the firing of said persons, including plaintiff, were made in the course of and in furtherance of the aforesaid conspiracy. The firing of plaintiff was in the course of, in furtherance of and was the culmination of the aforesaid conspiracy.

38. As a result of the deprivations of plaintiff's civil rights, as heretofore alleged, plaintiff suffered loss of employment, loss of income, loss of earning capacity, loss of earning potential, damage to his reputation, standing and associations in his community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage. Because of emotional upset caused by his firing, plaintiff suffered an aggravation of pre-existing Crone's Disease which has caused him additional physical pain and suffering and has further caused him to incur medical expense all of which may continue into the indefinite future.



WHEREFORE, plaintiff claims compensatory damages in an amount of \$500,000.00.

## SECOND COUNT

### *Plaintiff vs. Ms. Hafer and Mr. West for Conspiracy to Interfere with Civil Rights*

39. Under the Penal Laws of the United States and the Commonwealth of Pennsylvania, plaintiff was not guilty of any crime in connection with his employment, continued employment or promotions with the Office of the Auditor General of Pennsylvania. Further, in accordance with the Policy Procedural Manual of the Office of the Auditor General of Pennsylvania, he was not properly the subject of discipline, demotion, suspension or dismissal. Further, by the fall of 1988, all applicable statutes of limitation had expired with regard to any allegation of an improper payment for promotion in 1978.

40. Ms. Hafer and Mr. West conspired and acted in concert to impede, hinder, obstruct and defeat the due course of justice in the Commonwealth of Pennsylvania with the intent to deny plaintiff as well as the other 20 employees on the list of employees transmitted by Mr. West to Mr. Bailey in Mr. West's letter of January 21, 1988, the equal protection of the laws. Defendants further conspired to deprive plaintiff and the class of persons which consists of the 21 employees named on the list in Exhibit "1" for purely political reasons, of equal protection under the laws. Ms. Hafer and Mr. West conspired to cause plaintiff and the other employees on the list to lose their jobs even though they had committed no criminal activity, the applicable statutes of limitations for criminal charges had expired as to some of them and even though their firings were in violation of the Policy and Procedure Manual of the Office of Auditor General of Pennsylvania with regard to discipline, demotion or suspension and dismissal and, as to some of them, their firings were also in violation of an applicable collective bargaining agreement.

41. As a result of said conspiracy, plaintiff suffered loss of employment, loss of income, loss of earning capacity, loss of

earning potential, damage to his reputation, standing and associations in his community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage. Because of emotional upset caused by his firing, plaintiff suffered an aggravation of pre-existing Crone's Disease which has caused him additional physical pain and suffering and has further caused him to incur medical expense all of which may continue into the indefinite future.

WHEREFORE, plaintiff claims compensatory damages of defendants in the amount of \$500,000.00.

## THIRD COUNT

### *Plaintiff vs. Defendants for Punitive Damages*

42. Plaintiff re-alleges all preceding paragraphs.

43. The conduct of defendants, as heretofore alleged, was motivated by an evil motive and evil intent and acted with reckless and callous indifference to plaintiff's federally protected rights. Defendants acted in bad faith, without reasonable cause, and in wanton disregard for plaintiff's Constitutional rights. Defendant maliciously made charges stigmatizing plaintiff's reputation.

WHEREFORE, plaintiff claims punitive damages of defendants in the amount of \$500,000.00

## FOURTH COUNT

### *Plaintiff vs. Defendants for Counsel Fees*

44. Plaintiff re-alleges all preceding paragraphs.

45. Pursuant to 42 U.S.C. 1988, plaintiff requests that the Court award and direct defendants to pay plaintiff's reasonable attorney's fees.

WHEREFORE, plaintiff claims of defendants reasonable attorney fees in an amount not yet determined.

## FIFTH COUNT

### *Plaintiff vs. Defendant West for Defamation (State Action)*



46. Plaintiff re-alleges all preceding paragraphs.

47. During the course of the 1988 campaign for Pennsylvania Auditor General, which occurred from approximately April through November, 1988, Mr. West provided Ms. Hafer with a copy of Exhibit "1" and advised Ms. Hafer that the persons whose name appeared on the list in Exhibit "1," including plaintiff, "bought their jobs" with the Office of the Auditor General.

48. The statement made by Mr. West to Ms. Hafer that plaintiff "bought his job" was defamatory.

49. In the course of the campaign, Ms. Hafer made repeated statements that the persons whose names appeared on the list provided by Mr. West "bought their jobs" which statements constituted re-publications of Mr. West's original defamation.

50. On or about February 1, 1989, Ms. Hafer fired plaintiff in whole or in part because plaintiff's name was on the list and because Mr. West had told Ms. Hafer, during the fall, 1988 campaign, that all of the persons whose names appeared on the list had "bought their jobs".

51. On February 1, 1989, Ms. Hafer made public statements that the persons she was firing that day, including plaintiff, had paid up to \$5,000 each for their jobs. This statement constituted a re-publication of the original defamation made by Mr. West.

52. Plaintiff avers, on information and belief, that the defamatory statement made by Mr. West to Ms. Hafer that plaintiff "bought his job" was made both orally and in writing although plaintiff does not have a copy of that writing. Plaintiff does not know the precise dates of the defamatory communications but alleges that they occurred during the fall, 1988 campaign for the Office of Auditor General.

53. The statement made by Ms. Hafer in her letter of February 1, 1989 accusing plaintiff of involvement in a job buying and/or job promotion scheme in the Auditor General's Office and the public statements made by Ms. Hafer on February 1, 1989 that the persons she was firing, including plaintiff, had paid up to \$5,000 each for their jobs were re-publications of the original defamation made by Mr. West

and were due, in whole or in part, to Mr. West's aforesaid original defamation.

54. The aforesaid defamatory communication was false. Plaintiff had no involvement in any job buying and/or job promotion scheme in the Auditor General's office. Plaintiff did not provide money or anything of value to any person in connection with his employment, continued employment or the promotions he received during the course of his employment. Further, plaintiff has no knowledge that any third-person provided money or anything of value on plaintiff's behalf in connection with plaintiff's employment.

55. The aforesaid defamatory communication was made with malice, without reasonable cause, without a reasonable basis for Mr. West to believe that the statement was true, with knowledge that the statement was true and/or with reckless disregard for the truth or falsity of the statement and without privilege, absolute or qualified, and/or under circumstances which constitute an abuse of any qualified privilege.

56. Ms. Hafer and Mr. West engaged in concerted and conspiratorial conduct in creating a campaign issue during the fall 1988 campaign for the Auditor General's Office wherein allegations were made that Mr. West had provided Ms. Hafer with a list of twenty-one (21) employees who had bought their jobs. In engaging in said conspiracy, Mr. West and Ms. Hafer were motivated, in whole or in part, to enable Ms. Hafer to win the election. All statements made by Ms. Hafer during the course of the campaign that persons on the list bought their jobs and all statements made by Ms. Hafer after her election in connection with the firing of said persons, including plaintiff, were made in the course of and in furtherance of the aforesaid conspiracy and constituted re-publication of the original defamatory statements made by Mr. West with regard to providing Ms. Hafer with a copy of Exhibit "1" and advising Ms. Hafer that all persons whose names appeared on the list within Exhibit "1" had "bought their jobs." Accordingly, Mr. West is legally responsible for all damages sustained by plaintiff in connection with defamatory statements made by Ms. Hafer during the campaign and subsequent to her election.

57. As a result of the aforesaid defamation, plaintiff suffered loss of employment, loss of income, loss of earning capacity, loss of earning potential, damage to his reputation, standing and associations in his community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage. Because of emotional upset caused by his firing, plaintiff suffered an aggravation of pre-existing Crone's disease which has caused him additional physical pain and suffering and has further caused him to incur medical expense all of which may continue into the indefinite future.

WHEREFORE, plaintiff claims compensatory damages of Mr. West in an amount of \$500,000.00 and punitive damages against Mr. West in the amount of \$500,000.00.

#### SIXTH COUNT

*Plaintiff vs. Mr. West for Interference of Contractual and Prospective Contractual Relations (State Action)*

58. Plaintiff re-alleges all preceding paragraphs.

59. In 1987 and 1988, plaintiff was an employee in the Office of the Auditor General of Pennsylvania. In accordance with the Policy and Procedural Manual in effect in 1988 and 1989, plaintiff had a reasonable expectation that his employment would continue if he properly performed his duties.

60. The communications made by Mr. West to Ms. Hafer during the Fall 1988 campaign, as aforesaid, constituted an intentional and improper and unprivileged interference with the employment relationship between plaintiff and the Office of the Auditor General of Pennsylvania, present and/or future. Mr. West induced Ms. Hafer to improperly terminate plaintiff's employment. Further, Mr. West intentionally, improperly and without privilege interfered with plaintiff's prospective employment in the Office of the Auditor General and caused the Auditor General, Ms. Hafer, not to continue plaintiff's employment and to terminate that employment.

61. As a result of Mr. West's tortious conduct as described in this Sixth Count, plaintiff suffered loss of employment, loss of income, loss of earning capacity, loss of earning potential,

damage to his reputation, standing and associations in his community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage. Because of emotional upset caused by his firing, plaintiff suffered an aggravation of pre-existing Crone's disease which has caused him additional physical pain and suffering and has further caused him to incur medical expense all of which may continue into the indefinite future.

WHEREFORE, plaintiff claims compensatory damages in the amount of \$500,000.00 and punitive damages in the amount of \$500,000.00.

GROEN, LAVESON, GOLDBERG,  
RUBENSTONE & FLAGER

By: /s/ William Goldstein

WILLIAM GOLDSTEIN, ESQ.  
One Greenwood Square  
Suite 101  
Bensalem, PA 19020  
(215) 638-9330  
*Counsel for Plaintiff*

Dated: May 18, 1989

[Exhibit 1 included at JA-87]



**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JAMES C. MELO, JR.	:	CIVIL ACTION
	:	NO. 89-2935
vs.	:	
	:	
BARBARA HAFER	:	JURY TRIAL
and	:	DEMANDED
JAMES J. WEST, ESQUIRE	:	
<i>Defendants.</i>	:	

**ANSWER AND COUNTERCLAIM OF  
DEFENDANT BARBARA HAFER**

1. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted in part, denied in part. It is admitted that plaintiff was an employee of the Auditor General's Office from 1977 to 1989 but the remaining averments of this paragraph are denied because defendant Hafer is without knowledge of information sufficient to form a belief as to the truth or falsity of these averments.

7. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment.

8. Denied. It is averred on information and belief that plaintiff's promotion to Field Auditor III was purchased by virtue of a payment made by "Reds" Barbone to John Kerr, a former employee of the Department of Auditor General of Pennsylvania and a convicted felon, currently serving time in prison for his related, unlawful activities.

9. Admitted.

10. Admitted.

11. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this

averment. By way of further answer, defendant Hafer states that this so-called "investigation" was delegated by Mr. Bailey to James L. McAneny, who performed said "investigation" despite a conflict of interest arising from his prior association with the law office of Calvin Lieberman, at the same time that Lieberman represented John Kerr in the criminal investigation of Kerr for the job-buying scheme in the Auditor General's office for which Kerr eventually went to prison and McAneny's participation in the cover-up of this job-buying scheme which occurred during the Benedict administration.

12. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment.

13. Admitted.

14. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment.

15. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment.

16. Admitted.

17. Denied. Mr. West did not provide defendant Hafer with any such list prior to defendant Hafer's inauguration as Auditor General.

18. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment. By way of further answer, defendant Hafer denies that such list was provided prior to her inauguration.

19. Denied.

20. Denied. Defendant Hafer received no such list or information.

21. Admitted.

22. Admitted.

23. Admitted.

24. Admitted.

25. Denied.

26. Denied. Subsequent to the election defendant Hafer and representatives from her office conducted an investigation in regard to the job-buying scheme.



27. Denied. By way of further answer, defendant Hafer avers that she had in her possession on February 1, 1989, extensive information learned as a result of the investigation referred to in paragraph 26.

28. Denied. The firing of plaintiff was not the result of joint, concerted and conspiratorial conduct between defendant Hafer and defendant West to create a campaign issue but instead, was the result of an investigation and a commitment to eliminate all public employees who had purchased their jobs as a result of the illegal job-buying scheme for which Benedict and Kerr are serving prison terms.

29. Denied as a conclusion of law to which no responsive pleading is required.

30. Admitted in part, denied in part. It is admitted in part that the Department of Auditor General has a policy procedure manual, copies of various sections of which were attached to the plaintiff's complaint. It is denied as a conclusion of law to which no responsive pleading is required that this manual provides the sole mechanism for disciplining, demoting or suspending employees.

31. Denied as a conclusion of law to which no responsive pleading is required. It is further denied because at all times, defendant Hafer complied with the requirements of due process and all applicable laws and regulations.

32. N/A.

33. Denied as a conclusion of law to which no responsive pleading is required.

34. Denied as a conclusion of law to which no responsive pleading is required.

35. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, defendant Hafer denies that plaintiff's firing was because of political affiliation as defendant Hafer was unaware of plaintiff's political affiliation.

36. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, defendant Hafer did not disseminate any statement identifying plaintiff.

37. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, defendant Hafer engaged in no conspiracy with Mr. West, was not provided with

a list of names prior to her inauguration as Auditor General and at all times, acted solely in the public interest.

38. Denied. Defendant Hafer did not deprive plaintiff of his civil rights. Defendant is without sufficient knowledge to form a belief as to the truth or falsity of the remaining averments of this paragraph.

39. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, defendant Hafer avers that plaintiff was properly the subject of discipline, demotion, suspension and/or dismissal because his job was purchased as part of the job-buying scheme for which former Auditor General Benedict and his deputy John Kerr have gone to prison.

40. Denied. Defendant Hafer did not act in concert or conspire with anyone to impede, hinder, obstruct and /or defeat the due course of justice by dismissing plaintiff or any other employees following her inauguration as Auditor General. Defendant Hafer fired employees whose jobs were purchased as part of the job-buying scheme and these dismissals complied with due process and all applicable regulations.

41. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment.

42. N/A.

43. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, defendant Hafer avers the firing of plaintiff was not motivated by an evil motive or intent and was not in wanton disregard of plaintiff's constitutional rights but was part of defendant Hafer's efforts to remove persons from the office of Auditor General who had purchased their jobs as part of the illegal job-buying scheme.

44. N/A.

45. Denies as a conclusion of law to which no responsive pleading is required.

46. N/A.

47. N/A.

48. N/A.

49. N/A.

50. N/A.

- 51. N/A.
- 52. N/A.
- 53. N/A.
- 54. N/A.
- 55. N/A.
- 56. N/A.
- 57. N/A.
- 58. N/A.
- 59. N/A.
- 60. N/A.
- 61. N/A.

#### AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted.
2. Plaintiff's claims are barred by the doctrines of waiver and estoppel.
3. Plaintiff failed to mitigate his damages.
4. Plaintiff's punitive damage claims are invalid and improper and violate the United States and Pennsylvania Constitutions.
5. Plaintiff's claims are barred by the doctrine of unclean hands.
6. Plaintiff's claims are barred by the Eleventh Amendment.
7. Plaintiff's claims are barred by the doctrine of qualified immunity.
8. Plaintiff's claims are barred by the doctrine of exhaustion of remedies.
9. Plaintiff's claims are barred because plaintiff was provided with sufficient due process by virtue of the procedures provided by applicable laws and regulations pertaining to employees of the Auditor General.
10. Plaintiff's claims are barred for lack of jurisdiction.
11. Plaintiff's claims are barred because service of process was improper.

\* \* \*

WHEREFORE, defendant Hafer requests that the Complaint be dismissed with prejudice and judgment be entered in favor of defendant Hafer.

---

Jerome R. Richter, Esquire  
 Jay W. Eisenhofer, Esquire  
 BLANK, ROME, COMISKY & MCCAULEY  
 1200 Four Penn Center Plaza  
 Philadelphia, PA 19103  
 (215) 569-5500

Attorneys for Defendant,  
 Pennsylvania Auditor General  
 Barbara Hafer

Dated: August 9, 1989

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CARL GURLEY

vs.

BARBARA HAFER

*Plaintiff**Defendant*

: CIVIL ACTION

: No. 89-2685

**COMPLAINT**

1. Plaintiff is an individual who resides at 1430 North Felton Street, Philadelphia, PA 19131. Plaintiff resides within the Eastern District of Pennsylvania.

2. Defendant is the duly elected Auditor General of the Commonwealth of Pennsylvania and maintains a regular place of business in the Office of the Auditor General, Harrisburg, PA, 17120. Plaintiff does not know Defendant's resident address.

3. From January, 1979 through February 21, 1989, Plaintiff was continuously employed by the Commonwealth of Pennsylvania in the Office of the Auditor General as an Investigator. During said period of time, Plaintiff received promotions and his work was uniformly rated as satisfactory or better than satisfactory.

4. From January, 1980 to February 21, 1989, Plaintiff was Special Agent in charge of Philadelphia Office of the Auditor General's Bureau of Investigations with his office at 1400 Spring Garden Street, Philadelphia, PA, which is within the Eastern District of Pennsylvania.

5. The position Plaintiff held with the Office of the Auditor General was not that of an advisor or formulator of plans for the implementation of broad goals. Plaintiff did not serve in a policy-making or confidential position. Party affiliation was not a necessary or appropriate requirement for the effective performance of Plaintiff's duties.

6. Plaintiff is a registered Democrat and has been so registered since 1955.

7. Defendant was elected to the position of Auditor General in the November, 1988 election and assumed the duties of her office January, 1989.

8. Defendant is a registered Republican and was elected to the position of Auditor General as the Republican candidate for that position.

9. The Auditor General before Defendant was Donald Bailey ("Mr. Bailey").

10. Mr. Bailey was defendant's opponent in the November, 1988 election and was the Democrat candidate for that office. Mr. Bailey lost the election to Defendant.

11. The personnel disciplinary powers of the Department of the Auditor General are governed by the same due process standards that control decisions by any prosecutorial or civil authority.

12. In or about January, 1986, the Department of Auditor General promulgated Policy Procedure Manual which has continued to be in full force and effect from January, 1986 to the present. Sections 200 and 300 of said Manual apply to Position Actions and Separations and specify the circumstances under which an employee of the Office of Auditor General may be disciplined, demoted, suspended or dismissed. Copies of Section 200 and 300 are attached hereto and marked Exhibit "1" and "2" respectively.

13. On February 21, 1989, Defendant discharged Plaintiff from employment. Defendant issued to Plaintiff and made part of Plaintiff's file a certain discharge letter dated February 21, 1989, a copy of which is attached hereto and marked Exhibit "3".

14. The Defendant has provided Plaintiff with no reason for his discharge.

**FIRST COUNT****DEPRIVATION OF DUE PROCESS**

15. Plaintiff re-alleges all preceding paragraphs.

16. When Defendant fired Plaintiff on or about February 21, 1989, Defendant, under color of law of the Commonwealth of Pennsylvania, subjected Plaintiff, a citizen of the United States to a deprivation of the rights, privileges and immunities secured by the Constitution and laws of the United States.

17. Defendant did not follow, comply or conform to the Policy and Procedure Manual of the Department of the Auditor



General with regard to position actions and separations as well as disciplinary actions and dismissal.

18. Defendant denied Plaintiff property and property rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and as guaranteed by the Federal Civil Rights Act, 42 U.S. Code, Section 1983.

19. As a result of the deprivations of Plaintiff's civil rights, as heretofore alleged, Plaintiff suffered loss of employment, loss of income, loss of earning capacity, loss of earning potential, damage to his reputation, standing and associations in his community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage.

WHEREFORE, Plaintiff claims compensatory damages against Defendant for monetary losses and physical and emotional pain and suffering of \$500,000.00.

## SECOND COUNT

### DEPRIVATION OF FREEDOM OF SPEECH

20. Plaintiff re-alleges all preceding paragraphs.

21. Defendant fired Plaintiff because of Plaintiff's political affiliation to wit, the Plaintiff was a Democrat. In so doing Defendant caused Plaintiff to be deprived of his right to free speech in violation of the First Amendment to the Constitution of the United States and as guaranteed by the Federal Civil Rights Act, 42 U.S. Code, Section 1983.

22. As a result of the deprivations of Plaintiff's civil rights, as heretofore alleged, Plaintiff suffered loss of employment, loss of income, loss of earning capacity, loss of earning potential, damage to his reputation, standing and associations in his community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage.

WHEREFORE, Plaintiff claims compensatory damages against Defendant for monetary losses and physical and emotional pain and suffering of \$500,000.00.

## THIRD COUNT

### PUNITIVE DAMAGES

23. Plaintiff re-alleges all preceding paragraphs.

24. When Defendant fired Plaintiff, Defendant was motivated by an evil motive and evil intent and acted with reckless and callous indifference to Plaintiff's federally protected rights. Defendant acted in bad faith, without reasonable cause, and in wanton disregard for Plaintiff's Constitutional rights. Defendant maliciously made charges stigmatizing Plaintiff's reputation.

WHEREFORE, Plaintiff claims punitive damages of Defendant in the amount of \$500,000.00.

## FOURTH COUNT

### COUNSEL FEES

25. Plaintiff re-alleges all preceding paragraphs.

26. Pursuant to the Federal Civil Rights Act, 42 U.S. Code, Section 1988, Plaintiff requests that the Court award and direct Defendant to pay Plaintiff's reasonable attorney's fees.

WHEREFORE, Plaintiff claims of defendant reasonable attorney fees in an amount not yet determined.

GROEN, LAVESON, GOLDBERG,  
RUBENSTONE & FLAGER

By: /s/ William Goldstein

WILLIAM GOLDSTEIN, ESQUIRE

DATED: \_\_\_\_\_

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CARL GURLEY	<i>Plaintiff,</i>	:	CIVIL ACTION
vs.		:	NO. 89-2615
BARBARA HAER	<i>Defendant.</i>	:	JURY TRIAL DEMANDED

**ANSWER OF DEFENDANT TO COMPLAINT**

1. Defendant is without sufficient knowledge to form a belief as to the truth or falsity of this averment.
2. Admitted.
3. Defendant is without sufficient knowledge to form a belief as to the truth or falsity of this averment.
4. Defendant is without sufficient knowledge to form a belief as to the truth or falsity of this averment.
5. Defendant is without sufficient knowledge to form a belief as to the truth or falsity of this averment.
6. Defendant is without sufficient knowledge to form a belief as to the truth or falsity of this averment.
7. Admitted.
8. Admitted.
9. Admitted.
10. Admitted.
11. Denied as a conclusion of law to which no responsive pleading is required.
12. Admitted in part, denied in part. It is admitted in part that the Department of Auditor General has a policy procedure manual, copies of various sections of which were attached to the plaintiff's complaint. It is denied as a conclusion of law to which no responsive pleading is required that this manual provides the sole mechanism for disciplining, demoting or suspending employees.
13. Admitted.
14. Denied. Plaintiff was discharged because his services were no longer needed.
15. N/A.

16. Denied as a conclusion of law to which no responsive pleading is required. It is further denied that defendant Haer deprived plaintiff of any rights secured by the Constitution and/or laws of the United States.

17. Denied as a conclusion of law to which no responsive pleading is required. It is further denied that the defendant failed to conform to controlling standards of laws and due process.

18. Denied as a conclusion of law to which no responsive pleading is required. It is further denied that the defendant failed to conform to controlling standards of law and due process.

19. Denied. Defendant Haer did not deprive plaintiff of his civil rights. Defendant is without sufficient knowledge to form a belief as to the truth or falsity of the remaining averments of this paragraph.

20. N/A.

21. Denied. Plaintiff's political affiliations played no part in defendant's decision to terminate plaintiff as defendant was unaware of said political affiliation.

22. Denied. Defendant Haer did not deprive plaintiff of his civil rights. Defendant is without sufficient knowledge to form a belief as to the truth or falsity of the remaining averments of this paragraph.

23. N/A.

24. Denied as a conclusion of law to which no responsive pleading is required. It is further denied that defendant was motivated by an evil motive and/or evil intent or that defendant acted in bad faith and with wanton disregard to plaintiff's constitutional rights.

25. N/A.

26. Denied as a conclusion of law to which no responsive pleading is required.

**AFFIRMATIVE DEFENSES**

1. The Complaint fails to state a claim upon which relief can be granted.
2. Plaintiff's claims are barred by the doctrines of waiver and estoppel.

3. Plaintiff failed to mitigate his damages.
4. Plaintiff's punitive damage claims are invalid and improper and violate the Constitution.
5. Plaintiff's claims are barred by the doctrine of unclean hands.
6. Plaintiff's claims are barred by the Eleventh Amendment.
7. Plaintiff's claims are barred by the doctrine of qualified immunity.
8. Plaintiff's claims are barred by the doctrine of exhaustion of remedies.
9. Plaintiff's claims are barred because plaintiff was provided with sufficient due process by virtue of the procedures provided by applicable laws and regulations pertaining to employees of the Auditor General.
10. Plaintiff's claims are barred for lack of jurisdiction.
11. Plaintiff's claims are barred because service of process was improper.

WHEREFORE, defendant requests that this Honorable Court enter judgment in its favor and dismiss plaintiff's claims with prejudice.

/s/ JAY EISENHOFER

JEROME R. RICHTER, ESQUIRE  
 JAY W. EISENHOFER, ESQUIRE  
 BLANK, ROME, COMISKY & MCCAULEY  
 1200 Four Penn Center Plaza  
 Philadelphia, PA 19103  
 (215) 569-5500

*Attorney for defendant,  
 Barbara Hafer*

DATED: June 15, 1989

IN THE UNITED STATES DISTRICT COURT  
 FOR THE EASTERN DISTRICT OF PENNSYLVANIA

W. GERARD BEST

*Plaintiff*

vs.

BARBARA HAFER

*Defendant*

CIVIL ACTION

NO. 89-3847

COMPLAINT

1. Plaintiff is an individual who resides at 4932 Cedar Avenue, Philadelphia, PA 19143.
2. Defendant is the duly elected Auditor General of the Commonwealth of Pennsylvania and maintains a regular place of business in the Office of the Auditor General, Harrisburg, PA, 17120. Plaintiff does not know Defendant's resident address.
3. From February 4, 1985 through February 21, 1989, Plaintiff was continuously employed by the Commonwealth of Pennsylvania in the Office of the Auditor General as a Bureau Director. During said period of time, Plaintiff received promotions and his work was uniformly rated as satisfactory or better than satisfactory.
4. From February 4, 1985 until July, 1986, Plaintiff was the Director of the Bureau of Public Assistance Accounts and the Bureau of State Aid Audits. Both Bureaus are subdivisions with the Auditor General's Office.
5. The position Plaintiff held with the Office of the Auditor General was not that of an advisor or formulator of plans for the implementation of broad goals. Plaintiff did not serve in a policy-making or confidential position. Party affiliation was not a necessary or appropriate requirement for the effective performance of Plaintiff's duties.
6. Plaintiff is a registered Democrat and has been so registered since 1963. Plaintiff at all times relevant hereto has been a Democratic Committeeman in the 9th Division, 46th Ward in Philadelphia, PA.



7. Defendant was elected to the position of Auditor General in the November, 1988 election and assumed the duties of her office January, 1989.

8. Defendant is a registered Republican and was elected to the position of Auditor General as the Republican candidate for that position.

9. The Auditor General before Defendant was Donald Bailey ("Mr. Bailey").

10. Mr. Bailey was Defendant's opponent in the November, 1988 election and was the Democrat candidate for that office. Mr. Bailey lost the election to Defendant.

11. The personnel disciplinary powers of the Department of the Auditor General are governed by the same due process standards that control decisions by any prosecutorial or civil authority.

12. In or about January, 1986, the Department of Auditor General promulgated Policy Procedure Manual which has continued to be in full force and effect from January, 1986 to the present. Sections 200 and 300 of said Manual apply to Position Actions and Separations and specify the circumstances under which an employee of the Office of Auditor General may be disciplined, demoted, suspended or dismissed. Copies of Section 200 and 300 are attached hereto and marked Exhibit "1" and "2" respectively.

13. On February 21, 1989, Defendant discharged Plaintiff from employment. Defendant issued to Plaintiff and made part of Plaintiff's file a certain discharge letter dated February 21, 1989, a copy of which is attached hereto and marked Exhibit "3".

14. The Defendant has provided Plaintiff with no reason for his discharge.

### FIRST COUNT

#### DEPRIVATION OF DUE PROCESS

15. Plaintiff re-alleges all preceding paragraphs.

16. When Defendant fired Plaintiff on or about February 21, 1989, Defendant, under color of law of the Commonwealth of Pennsylvania, subject Plaintiff, a citizen of the United States

to a deprivation of the rights, privileges and immunities secured by the Constitution and laws of the United States.

17. Defendant did not follow, comply or conform to the Policy and Procedure Manual of the Department of the Auditor General with regard to position actions and separations as well as disciplinary actions and dismissal.

18. Defendant denied Plaintiff property and property rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and as guaranteed by the Federal Civil Rights Act, 42 U.S. Code, Section 1983.

19. As a result of the deprivations of Plaintiff's civil rights, as heretofore alleged, Plaintiff suffered loss of employment, loss of income, loss of earning capacity, loss of earning potential, damage to his reputation, standing and associations in his community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage.

WHEREFORE, Plaintiff claims compensatory damages against Defendant for monetary losses and physical and emotional pain and suffering of \$500,000.00.

### SECOND COUNT

#### DEPRIVATION OF FREEDOM OF SPEECH

20. Plaintiff re-alleges all preceding paragraphs.

21. Defendant fired Plaintiff because of Plaintiff's political affiliation to wit, the Plaintiff was a Democrat. In so doing Defendant caused Plaintiff to be deprived of his right to free speech in violation of the First Amendment to the Constitution of the United States and as guaranteed by the Federal Civil Rights Act, 42 U.S. Code, Section 1983.

22. As a result of the deprivations of Plaintiff's civil rights, as heretofore alleged, Plaintiff suffered loss of employment, loss of income, loss of earning capacity, loss of earning potential, damage to his reputation, standing and associations in his community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage.

WHEREFORE, Plaintiff claims compensatory damages against Defendant for monetary losses and physical and emotional pain and suffering of \$500,000.00

### THIRD COUNT PUNITIVE DAMAGES

23. Plaintiff re-alleges all preceding paragraphs.

24. When Defendant fired Plaintiff, Defendant was motivated by an evil motive and evil intent and acted with reckless and callous indifference to Plaintiff's federally protected rights. Defendant acted in bad faith, without reasonable cause, and in wanton disregard for Plaintiff's Constitutional rights. Defendant maliciously made charges stigmatizing Plaintiff's reputation.

WHEREFORE, Plaintiff claims punitive damages of Defendant in the amount of \$500,000.00

### FOURTH COUNT COUNSEL FEES

25. Plaintiff re-alleges all preceding paragraphs.

26. Pursuant to the Federal Civil Rights Act, 42 U.S. Code, Section 1988, Plaintiff requests that the Court award and direct Defendant to pay Plaintiff's reasonable attorney's fees.

WHEREFORE, Plaintiff claims of Defendant reasonable attorney fees in an amount not yet determined.

GROEN, LAVESON, GOLDBERG,  
RUBENSTONE & FLAGER

By: /s/

WILLIAM GOLDSTEIN, ESQUIRE

Dated: May 15, 1989

### IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL BRENNAN,	:	CIVIL ACTION
MARGARET CASPER,	:	
ELIZABETH BUCHMILLER,	:	
DANIEL CLEMSON,	:	
MARY FAGER, and	:	
GEORGE A. FRANKLIN, JR.	:	
vs.	:	
BARBARA HAFER	:	NO. 89-4950

### COMPLAINT

#### *The Parties*

1. Plaintiff Michael Brennan is an individual who resides in Pottsville, Pennsylvania.

2. Plaintiff Margaret Casper is an individual who resides in Palmyra, Pennsylvania.

3. Plaintiff Elizabeth Buchmiller is an individual who resides in Whitehall, Pennsylvania.

4. Plaintiff Daniel Clemson is an individual who resides in Mechanicsburg, Pennsylvania.

5. Plaintiff Mary Fager is an individual who resides in Harrisburg, Pennsylvania.

6. Plaintiff George A. Franklin, Jr. is an individual who resides in Harrisburg, Pennsylvania.

7. Defendant Barbara Hafer ("Ms. Hafer") is the current Auditor General of the Commonwealth of Pennsylvania and maintains regular places of business for the Office of the Auditor General through Pennsylvania including the Eastern District of Pennsylvania. Plaintiffs do not know Ms. Hafer's resident address.

### JURISDICTION

8. This is an action to redress the deprivation, under color of Pennsylvania Law, of rights and privileges secured to plaintiffs by the Constitution of the United States together with



pendent state court claims. Jurisdiction arises under 42 U.S.C. 1983, 1985 and 1988 and 28 U.S.C. 1343 and pendent jurisdiction.

9. This action is related to the cases of *Best vs. Hafer*, C.A. 89-3847 and *Gurley vs. Hafer*, C.A. 89-2685 filed in the United States District Court for the Eastern District of Pennsylvania. Plaintiffs have asserted the same causes of action against the same defendant as asserted in the *Best* and *Gurley* Complaints. All plaintiffs herein were fired on February 21, 1989 like Mr. Best and Mr. Gurley, because of political association and affiliation, and not because of job performance.

#### STATEMENT OF OPERATIVE FACTS

10. For many years prior to February 21, 1989, plaintiffs were continuously employed by the Commonwealth of Pennsylvania in the Office of the Auditor General. During said period of time, plaintiffs received promotions and their work was often rated as satisfactory or better than satisfactory.

11. The position each plaintiff held with the Office of the Auditor General was not that of an advisor or formulator of plans for implementation of broad goals. Plaintiffs did not serve in a policy-making or confidential position. Party affiliation was not a necessary or appropriate requirement for the effective performance of plaintiffs' duties.

12. All plaintiffs except Mary Fager are registered democrats and were so registered during their period of employment with the Office of the Auditor General.

13. Defendant was elected to the position of Auditor General in the November 1988 election and assumed the duties of her office January 1989.

14. Defendant is a registered republican and was elected to the position of Auditor General as the republican candidate for that position.

15. The Auditor General before defendant was Donald Bailey ("Mr. Bailey").

16. Mr. Bailey was defendant's opponent in the November 1988 election and was the democratic candidate for that office. Mr. Bailey lost the election to defendant.

17. The personnel disciplinary powers of the Department of the Auditor General are governed by the same due process standards that control decisions by any prosecutorial or civil authority.

18. In or about January 1986, the Office of the Auditor General promulgated a Policy and Procedure Manual which has continued to be in full force and effect from January 1986 to the present. Sections 200 and 300 of said Manual apply to position actions and separations and specify the circumstances under which an employee of the Office of the Auditor General may be disciplined, demoted, suspended or dismissed. Copies of Sections 200 and 300 are attached hereto and marked Exhibits "1" and "2" respectively.

19. On February 21, 1989, defendant discharged plaintiffs from employment. Defendant issued to each plaintiff and made part of plaintiffs' files a certain discharge letter dated February 21, 1989, copies of which are attached hereto and marked Exhibits "3", "4", "5", "6", "7", and "8".

20. The defendant has provided plaintiffs with no reason for their discharge.

21. The defendant did not discharge any plaintiff because of unsatisfactory job performance.

#### FIRST COUNT

*Plaintiff Michael Brennan vs. Defendant  
For Deprivation of Due Process (Monetary Damages)*

22. Plaintiff Michael Brennan re-alleges all preceding paragraphs.

23. When defendant fired plaintiff on or about February 21, 1989, defendant, under color of law of the Commonwealth of Pennsylvania, subjected plaintiff, a citizen of the United States to a deprivation of the rights, privileges and immunities secured by the Constitution and laws of the United States.

24. Defendant did not follow, comply or conform to the Policy and Procedure Manual of the Office of the Auditor General with regard to position actions and separations as well as disciplinary actions and dismissal.



25. Defendant denied plaintiff property and property rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and as guaranteed by the Federal Civil Rights Act, 42 U.S.C. Section 1983.

26. As a result of the deprivation of plaintiff's civil rights, as heretofore alleged, plaintiff suffered loss of employment, loss of income, loss of accrued and future fringe benefits including sick and vacation pay and pension rights, loss of earning capacity, loss of earning potential, damage to his reputation, standing and association in his community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage.

WHEREFORE, plaintiff Michael Brennan claims compensatory damages against defendant for monetary losses and physical and emotional pain and suffering of \$500,000.00.

## SECOND COUNT

*Plaintiff Michael Brennan vs. Defendant  
For Deprivation of Freedom of Speech (Monetary Damages)*

27. Plaintiff Michael Brennan re-alleges all preceding paragraphs.

28. Defendant fired plaintiff because of plaintiff's political affiliation and because of plaintiff's political association with and support for Mr. Bailey. In so doing, defendant caused plaintiff to be deprived of his right of free speech, free association and political association in violation of the First Amendment to the Constitution of the United States and as guaranteed by the Federal Civil Rights Act, 42 U.S.C. Section 1983.

29. As a result of the deprivation of plaintiff's civil rights, as heretofore alleged, plaintiff suffered loss of employment, loss of income, loss of accrued and future fringe benefits including sick and vacation pay and pension rights, loss of earning capacity, loss of earning potential, damage to his reputation, standing and association in his community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage.

WHEREFORE, plaintiff Michael Brennan claims compensatory damages against defendant for monetary losses and physical and emotional pain and suffering of \$500,000.00.

## THIRD COUNT

*Plaintiff Michael Brennan vs. Defendant  
For Punitive Damages (Monetary Damages)*

30. Plaintiff Michael Brennan re-alleges all preceding paragraphs.

31. When defendant fired plaintiff, defendant was motivated by an evil motive and evil intent and acted with reckless and callous indifference to plaintiff's federally protected rights. Defendant acted in bad faith, without reasonable cause, and in wanton disregard for plaintiff's constitutional rights. Defendant maliciously made charges stigmatizing plaintiff's reputation.

WHEREFORE, plaintiff Michael Brennan claims punitive damages of defendant in the amount of \$500,000.00

## FOURTH COUNT

*Plaintiff Michael Brennan vs. Defendant  
For Non-Monetary Relief*

32. Plaintiff Michael Brennan re-alleges all preceding paragraphs.

33. By reason of the foregoing, plaintiff is entitled to and requests reinstatement and restoration of all accrued fringe benefits. Plaintiff does not request back pay in this Fourth Count because said Count is asserted against the defendant in her official capacity. The first three Counts are asserted against the defendant in her personal capacity.

WHEREFORE, plaintiff Michael Brennan demands that defendant in her official capacity re-hire plaintiff and restore to plaintiff all accrued fringe benefits.

## FIFTH COUNT

*Plaintiff Michael Brennan vs. Defendant  
For Counsel Fees*

34. Plaintiff Michael Brennan re-alleges all preceding paragraphs.

35. Pursuant to the Federal Civil Rights Act, 42 U.S.C., Section 1988, plaintiff requests that the Court award and direct defendant to pay plaintiff's reasonable attorney's fees.

WHEREFORE, plaintiff Michael Brennan claims of defendant reasonable attorney's fees in an amount not yet determined.

## SIXTH COUNT

*Plaintiff Margaret Casper vs. Defendant  
For Deprivation of Due Process (Monetary Damages)*

36. Plaintiff Margaret Casper re-alleges all preceding paragraphs.

37. When defendant fired plaintiff on or about February 21, 1989, defendant, under color of law of the Commonwealth of Pennsylvania, subjected plaintiff, a citizen of the United States to a deprivation of the rights, privileges and immunities secured by the Constitution and laws of the United States.

38. Defendant did not follow, comply or conform to the Policy and Procedure Manual of the Office of the Auditor General with regard to position actions and separations as well as disciplinary actions and dismissal.

39. Defendant denied plaintiff property and property rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and as guaranteed by the Federal Civil Rights Act, 42 U.S.C. Section 1983.

40. As a result of the deprivation of plaintiff's civil rights, as heretofore alleged, plaintiff suffered loss of employment, loss of income, loss of accrued and future fringe benefits including sick and vacation pay and pension rights, loss of earning capacity, loss of earning potential, damage to her reputation, standing and association in her community, disability with regard to future

employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage.

WHEREFORE, plaintiff Margaret Casper claims compensatory damages against defendant for monetary losses and physical and emotional pain and suffering of \$500,000.00.

## SEVENTH COUNT

*Plaintiff Margaret Casper vs. Defendant  
For Deprivation of Freedom of Speech (Monetary Damages)*

41. Plaintiff Margaret Casper re-alleges all preceding paragraphs.

42. Defendant fired plaintiff because of plaintiff's political affiliation and because of plaintiff's political association with and support for Mr. Bailey. In so doing, defendant caused plaintiff to be deprived of her right of free speech, free association and political association in violation of the First Amendment to the Constitution of the United States and as guaranteed by the Federal Civil Rights Act, 42 U.S.C. Section 1983.

43. As a result of the deprivation of plaintiff's civil rights, as heretofore alleged, plaintiff suffered loss of employment, loss of income, loss of accrued and future fringe benefits including sick and vacation pay and pension rights, loss of earning capacity, loss of earning potential, damage to her reputation, standing and association in her community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage.

WHEREFORE, plaintiff Margaret Casper claims compensatory damages against defendant for monetary losses and physical and emotional pain and suffering of \$500,000.00.

## EIGHTH COUNT

*Plaintiff Margaret Casper vs. Defendant  
For Punitive Damages (Monetary Damages)*

44. Plaintiff Margaret Casper re-alleges all preceding paragraphs.

45. When defendant fired plaintiff, defendant was motivated by an evil motive and evil intent and acted with reckless



and callous indifference to plaintiff's federally protected rights. Defendant acted in bad faith, without reasonable cause, and in wanton disregard for plaintiff's constitutional rights. Defendant maliciously made charges stigmatizing plaintiff's reputation.

WHEREFORE, plaintiff Margaret Casper claims punitive damages of defendant in the amount of \$500,000.00.

#### NINTH COUNT

*Plaintiff Margaret Casper vs. Defendant  
For Non-Monetary Relief*

46. Plaintiff Margaret Casper re-alleges all preceding paragraphs.

47. By reason of the foregoing, plaintiff is entitled to and requests reinstatement and restoration of all accrued fringe benefits. Plaintiff does not request back pay in this Ninth Count because said Count is asserted against the defendant in her official capacity. Counts 6, 7 and 8 are asserted against the defendant in her personal capacity.

WHEREFORE, plaintiff Margaret Casper demands that defendant in her official capacity re-hire plaintiff and restore to plaintiff all accrued fringe benefits.

#### TENTH COUNT

*Plaintiff Margaret Casper vs. Defendant  
For Counsel Fees*

48. Plaintiff Margaret Casper re-alleges all preceding paragraphs.

49. Pursuant to the Federal Civil Rights Act, 42 U.S.C., Section 1988, plaintiff requests that the Court award and direct defendant to pay plaintiff's reasonable attorney's fees.

WHEREFORE, plaintiff Margaret Casper claims of defendant reasonable attorney's fees in an amount not yet determined.

#### ELEVENTH COUNT

*Plaintiff Elizabeth Buchmiller vs. Defendant  
For Deprivation of Due Process (Monetary Damages)*

50. Plaintiff Elizabeth Buchmiller re-alleges all preceding paragraphs.

51. When defendant fired plaintiff on or about February 21, 1989, defendant, under color of law of the Commonwealth of Pennsylvania, subjected plaintiff, a citizen of the United States to a deprivation of the rights, privileges and immunities secured by the Constitution and laws of the United States.

52. Defendant did not follow, comply or conform to the Policy and Procedure Manual of the Office of the Auditor General with regard to position actions and separations as well as disciplinary actions and dismissal.

53. Defendant denied plaintiff property and property rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and as guaranteed by the Federal Civil Rights Act, 42 U.S.C. Section 1983.

54. As a result of the deprivation of plaintiff's civil rights, as heretofore alleged, plaintiff suffered loss of employment, loss of income, loss of accrued and future fringe benefits including sick and vacation pay and pension rights, loss of earning capacity, loss of earning potential, damage to her reputation, standing and association in her community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage.

WHEREFORE, plaintiff Elizabeth Buchmiller claims compensatory damages against defendant for monetary losses and physical and emotional pain and suffering of \$500,000.00.

#### TWELFTH COUNT

*Plaintiff Elizabeth Buchmiller vs. Defendant  
For Deprivation of Freedom of Speech (Monetary Damages)*

55. Plaintiff Elizabeth Buchmiller re-alleges all preceding paragraphs.



56. Defendant fired plaintiff because of plaintiff's political affiliation and because of plaintiff's political association with and support for Mr. Bailey. In so doing, defendant caused plaintiff to be deprived of her right of free speech, free association and political association in violation of the First Amendment to the Constitution of the United States and as guaranteed by the Federal Civil Rights Act, 42 U.S.C. Section 1983.

57. As a result of the deprivation of plaintiff's civil rights, as heretofore alleged, plaintiff suffered loss of employment, loss of income, loss of accrued and future fringe benefits including sick and vacation pay and pension rights, loss of earning capacity, loss of earning potential, damage to her reputation, standing and association in her community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage.

WHEREFORE, plaintiff Elizabeth Buchmiller claims compensatory damages against defendant for monetary losses and physical and emotional pain and suffering of \$500,000.00.

### THIRTEENTH COUNT

*Plaintiff Elizabeth Buchmiller vs. Defendant  
For Punitive Damages (Monetary Damages)*

58. Plaintiff Elizabeth Buchmiller re-alleges all preceding paragraphs.

59. When defendant fired plaintiff, defendant was motivated by an evil motive and evil intent and acted with reckless and callous indifference to plaintiff's federally protected rights. Defendant acted in bad faith, without reasonable cause, and in wanton disregard for plaintiff's constitutional rights. Defendant maliciously made charges stigmatizing plaintiff's reputation.

WHEREFORE, plaintiff Elizabeth Buchmiller claims punitive damages of defendant in the amount of \$500,000.00.

### FOURTEENTH COUNT

*Plaintiff Elizabeth Buchmiller vs. Defendant  
For Non-Monetary Relief*

60. Plaintiff Elizabeth Buchmiller re-alleges all preceding paragraphs.

61. By reason of the foregoing, plaintiff is entitled to and requests reinstatement and restoration of all accrued fringe benefits. Plaintiff does not request back pay in this Ninth Count because said Count is asserted against the defendant in her official capacity. Counts 11, 12 and 13 are asserted against the defendant in her personal capacity.

WHEREFORE, plaintiff Elizabeth Buchmiller demands that defendant in her official capacity re-hire plaintiff and restore to plaintiff all accrued fringe benefits.

### FIFTEENTH COUNT

*Plaintiff Elizabeth Buchmiller vs. Defendant  
For Counsel Fees*

62. Plaintiff Elizabeth Buchmiller re-alleges all preceding paragraphs.

63. Pursuant to the Federal Civil Rights Act, 42 U.S.C., Section 1988, plaintiff requests that the Court award and direct defendant to pay plaintiff's reasonable attorney's fees.

WHEREFORE, plaintiff Elizabeth Buchmiller claims of defendant reasonable attorney's fees in an amount not yet determined.

### SIXTEENTH COUNT

*Plaintiff Daniel Clemson vs. Defendant  
For Deprivation of Due Process (Monetary Damages)*

64. Plaintiff Daniel Clemson re-alleges all preceding paragraphs.

65. When defendant fired plaintiff on or about February 21, 1989, defendant, under color of law of the Commonwealth of Pennsylvania, subjected plaintiff, a citizen of the United States

to a deprivation of the rights, privileges and immunities secured by the Constitution and laws of the United States.

66. Defendant did not follow, comply or conform to the Policy and Procedure Manual of the Office of the Auditor General with regard to position actions and separations as well as disciplinary actions and dismissal.

67. Defendant denied plaintiff property and property rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and as guaranteed by the Federal Civil Rights Act, 42 U.S.C. Section 1983.

68. As a result of the deprivation of plaintiff's civil rights, as heretofore alleged, plaintiff suffered loss of employment, loss of income, loss of accrued and future fringe benefits including sick and vacation pay and pension rights, loss of earning capacity, loss of earning potential, damage to his reputation, standing and association in his community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage.

WHEREFORE, plaintiff Daniel Clemson claims compensatory damages against defendant for monetary losses and physical and emotional pain and suffering of \$500,000.00.

#### SEVENTEENTH COUNT

*Plaintiff Daniel Clemson vs. Defendant  
For Deprivation of Freedom of Speech (Monetary Damages)*

69. Plaintiff Daniel Clemson re-alleges all preceding paragraphs.

70. Defendant fired plaintiff because of plaintiff's political affiliation and because of plaintiff's political association with and support for Mr. Bailey. In so doing, defendant caused plaintiff to be deprived of his right of free speech, free association and political association in violation of the First Amendment to the Constitution of the United States and as guaranteed by the Federal Civil Rights Act, 42 U.S.C. Section 1983.

71. As a result of the deprivation of plaintiff's civil rights, as heretofore alleged, plaintiff suffered loss of employment, loss of income, loss of accrued and future fringe benefits including sick

and vacation pay and pension rights, loss of earning capacity, loss of earning potential, damage to his reputation, standing and association in his community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage.

WHEREFORE, plaintiff Daniel Clemson claims compensatory damages against defendant for monetary losses and physical and emotional pain and suffering of \$500,000.00.

#### EIGHTEENTH COUNT

*Plaintiff Daniel Clemson vs. Defendant  
For Punitive Damages (Monetary Damages)*

72. Plaintiff Daniel Clemson re-alleges all preceding paragraphs.

73. When defendant fired plaintiff, defendant was motivated by an evil motive and evil intent and acted with reckless and callous indifference to plaintiff's federally protected rights. Defendant acted in bad faith, without reasonable cause, and in wanton disregard for plaintiff's constitutional rights. Defendant maliciously made charges stigmatizing plaintiff's reputation.

WHEREFORE, plaintiff Daniel Clemson claims punitive damages of defendant in the amount of \$500,000.00.

#### NINETEENTH COUNT

*Plaintiff Daniel Clemson vs. Defendant  
For Non-Monetary Relief*

74. Plaintiff Daniel Clemson re-alleges all preceding paragraphs.

75. By reason of the foregoing, plaintiff is entitled to and requests reinstatement and restoration of all accrued fringe benefits. Plaintiff does not request back pay in this Fourth Count because said Count is asserted against the defendant in her official capacity. Counts 16, 17 and 18 are asserted against the defendant in her personal capacity.

WHEREFORE, plaintiff Daniel Clemson demands that defendant in her official capacity re-hire plaintiff and restore to plaintiff all accrued fringe benefits.



**TWENTIETH COUNT**

*Plaintiff Daniel Clemson vs. Defendant  
For Counsel Fees*

76. Plaintiff Daniel Clemson re-alleges all preceding paragraphs.

77. Pursuant to the Federal Civil Rights Act, 42 U.S.C., Section 1988, plaintiff requests that the Court award and direct defendant to pay plaintiff's reasonable attorney's fees.

WHEREFORE, plaintiff Daniel Clemson claims of defendant reasonable attorney's fees in an amount not yet determined.

**TWENTY-FIRST COUNT**

*Plaintiff Mary Fager vs. Defendant  
For Deprivation of Due Process (Monetary Damages)*

78. Plaintiff Mary Fager re-alleges all preceding paragraphs.

79. When defendant fired plaintiff on or about February 21, 1989, defendant, under color of law of the Commonwealth of Pennsylvania, subjected plaintiff, a citizen of the United States to a deprivation of the rights, privileges and immunities secured by the Constitution and laws of the United States.

80. Defendant did not follow, comply or conform to the Policy and Procedure Manual of the Office of the Auditor General with regard to position actions and separations as well as disciplinary actions and dismissal.

81. Defendant denied plaintiff property and property rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and as guaranteed by the Federal Civil Rights Act, 42 U.S.C. Section 1983.

82. As a result of the deprivation of plaintiff's civil rights, as heretofore alleged, plaintiff suffered loss of employment, loss of income, loss of accrued and future fringe benefits including sick and vacation pay and pension rights, loss of earning capacity, loss of earning potential, damage to her reputation, standing and association in her community, disability with regard to future

employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage.

WHEREFORE, plaintiff Mary Fager claims compensatory damages against defendant for monetary losses and physical and emotional pain and suffering of \$500,000.00.

**TWENTY-SECOND COUNT**

*Plaintiff Mary Fager vs. Defendant  
For Deprivation of Freedom of Speech (Monetary Damages)*

83. Plaintiff Mary Fager re-alleges all preceding paragraphs.

84. Defendant fired plaintiff because of plaintiff's political association with and support for Mr. Bailey. In so doing, defendant caused plaintiff to be deprived of her right of free speech, free association and political association in violation of the First Amendment to the Constitution of the United States and as guaranteed by the Federal Civil Rights Act, 42 U.S.C. Section 1983.

85. As a result of the deprivation of plaintiff's civil rights, as heretofore alleged, plaintiff suffered loss of employment, loss of income, loss of accrued and future fringe benefits including sick and vacation pay and pension rights, loss of earning capacity, loss of earning potential, damage to her reputation, standing and association in her community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage.

WHEREFORE, plaintiff Mary Fager claims compensatory damages against defendant for monetary losses and physical and emotional pain and suffering of \$500,000.00.

**TWENTY-THIRD COUNT**

*Plaintiff Mary Fager vs. Defendant  
For Punitive Damages (Monetary Damages)*

86. Plaintiff Mary Fager re-alleges all preceding paragraphs



87. When defendant fired plaintiff, defendant was motivated by an evil motive and evil intent and acted with reckless and callous indifference to plaintiff's federally protected rights. Defendant acted in bad faith, without reasonable cause, and in wanton disregard for plaintiff's constitutional rights. Defendant maliciously made charges stigmatizing plaintiff's reputation.

WHEREFORE, plaintiff Mary Fager claims punitive damages of defendant in the amount of \$500,000.00.

#### TWENTY-FOURTH COUNT

*Plaintiff Mary Fager vs. Defendant  
For Non-Monetary Relief*

88. Plaintiff Mary Fager re-alleges all preceding paragraphs.

89. By reason of the foregoing, plaintiff is entitled to and requests reinstatement and restoration of all accrued fringe benefits. Plaintiff does not request back pay in this Ninth Count because said Count is asserted against the defendant in her official capacity. Counts 21, 22 and 23 are asserted against the defendant in her personal capacity.

WHEREFORE, plaintiff Mary Fager demands that defendant in her official capacity re-hire plaintiff and restore to plaintiff all accrued fringe benefits.

#### TWENTY-FIFTH COUNT

*Plaintiff Mary Fager vs. Defendant  
For Counsel Fees*

90. Plaintiff Mary Fager re-alleges all preceding paragraphs.

91. Pursuant to the Federal Civil Rights Act, 42 U.S.C., Section 1988, plaintiff requests that the Court award and direct defendant to pay plaintiff's reasonable attorney's fees,

WHEREFORE, plaintiff Mary Fager claims of defendant reasonable attorney's fees in an amount not yet determined.

#### TWENTY-SIXTH COUNT

*Plaintiff George A. Franklin, Jr. vs. Defendant  
For Deprivation of Due Process (Monetary Damages)*

92. Plaintiff George A. Franklin, Jr. re-alleges all preceding paragraphs.

93. When defendant fired plaintiff on or about February 21, 1989, defendant, under color of law of the Commonwealth of Pennsylvania, subjected plaintiff, a citizen of the United States to a deprivation of the rights, privileges and immunities secured by the Constitution and laws of the United States.

94. Defendant did not follow, comply or conform to the Policy and Procedure Manual of the Office of the Auditor General with regard to position actions and separations as well as disciplinary actions and dismissal.

95. Defendant denied plaintiff property and property rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and as guaranteed by the Federal Civil Rights Act, 42 U.S.C. Section 1983.

96. As a result of the deprivation of plaintiff's civil rights, as heretofore alleged, plaintiff suffered loss of employment, loss of income, loss of accrued and future fringe benefits including sick and vacation pay and pension rights, loss of earning capacity, loss of earning potential, damage to his reputation, standing and association in his community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage.

WHEREFORE, plaintiff George A. Franklin, Jr. claims compensatory damages against defendant for monetary losses and physical and emotional pain and suffering of \$500,000.00.

#### TWENTY-SEVENTH COUNT

*Plaintiff George A. Franklin, Jr. vs. Defendant  
For Deprivation of Freedom of Speech (Monetary Damages)*

97. Plaintiff George A. Franklin, Jr. re-alleges all preceding paragraphs.

98. Defendant fired plaintiff because of plaintiff's political affiliation and because of plaintiff's political association with and support for Mr. Bailey. In so doing, defendant caused plaintiff to be deprived of his right of free speech, free association and political association in violation of the First Amendment to the Constitution of the United States and as guaranteed by the Federal Civil Rights Act, 42 U.S.C. Section 1983.

99. As a result of the deprivation of plaintiff's civil rights, as heretofore alleged, plaintiff suffered loss of employment, loss of income, loss of accrued and future fringe benefits including sick and vacation pay and pension rights, loss of earning capacity, loss of earning potential, damage to his reputation, standing and association in his community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage.

WHEREFORE, plaintiff George A. Franklin, Jr. claims compensatory damages against defendant for monetary losses and physical and emotional pain and suffering of \$500,000.00.

#### TWENTY-EIGHTH COUNT

*Plaintiff George A. Franklin, Jr. vs. Defendant  
For Punitive Damages (Monetary Damages)*

100. Plaintiff George A. Franklin, Jr. re-alleges all preceding paragraphs.

101. When defendant fired plaintiff, defendant was motivated by an evil motive and evil intent and acted with reckless and callous indifference to plaintiff's federally protected rights. Defendant acted in bad faith, without reasonable cause, and in wanton disregard for plaintiff's constitutional rights. Defendant maliciously made charges stigmatizing plaintiff's reputation.

WHEREFORE, plaintiff George A. Franklin, Jr. claims punitive damages of defendant in the amount of \$500,000.00.

#### TWENTY-NINTH COUNT

*Plaintiff George A. Franklin, Jr. vs. Defendant  
For Non-Monetary Relief*

102. Plaintiff George A. Franklin, Jr. re-alleges all preceding paragraphs.

103. By reason of the foregoing, plaintiff is entitled to and requests reinstatement and restoration of all accrued fringe benefits. Plaintiff does not request back pay in this Fourth Count because said Count is asserted against the defendant in her official capacity. Counts 26, 27 and 28 are asserted against the defendant in her personal capacity.

WHEREFORE, plaintiff George A. Franklin, Jr. demands that defendant in her official capacity re-hire plaintiff and restore to plaintiff all accrued fringe benefits.

#### THIRTIETH COUNT

*Plaintiff George A. Franklin, Jr. vs. Defendant  
For Counsel Fees*

104. Plaintiff George A. Franklin, Jr. re-alleges all preceding paragraphs.

105. Pursuant to the Federal Civil Rights Act, 42 U.S.C., Section 1988, plaintiff requests that the Court award and direct defendant to pay plaintiff's reasonable attorney's fees.

WHEREFORE, plaintiff George A. Franklin, Jr. claims of defendant reasonable attorney's fees in an amount not yet determined.

GROEN, LAVESON, GOLDBERG,  
RUBENSTONE & FLAGER

BY: /s/ WILLIAM GOLDSTEIN

WILLIAM GOLDSTEIN  
*Attorney for Plaintiffs*

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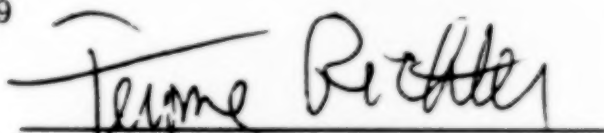
UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES C. MELO, JR., et al.	:	CIVIL ACTION
<i>Plaintiffs,</i>	:	NO. 89-2935
v.	:	
BARBARA HAFER	:	
and	:	
JAMES J. WEST, ESQUIRE	:	
<i>Defendants.</i>	:	
CARL GURLEY, et al.	:	CIVIL ACTION
<i>Plaintiffs,</i>	:	NO. 89-2685
v.	:	
BARBARA HAFER	:	
<i>Defendant</i>	:	

MOTION OF DEFENDANT BARBARA HAFER  
FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, defendant Barbara Hafer hereby requests that this Court enter summary judgment in her favor and dismiss the above-captioned cases.

Dated: August 9, 1989



Jerome R. Richter, Esquire  
Jay W. Eisenhofer, Esquire  
BLANK, ROME, COMISKY & MCCAULEY  
1200 Four Penn Center Plaza  
Philadelphia, PA 19103  
(215) 569-5500

Attorneys for Defendant,  
Pennsylvania Auditor General  
Barbara Hafer

JA-57

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES C. MELO, JR., et al.	:	CIVIL ACTION
<i>Plaintiffs,</i>	:	NO. 89-2935
v.	:	
BARBARA HAFER	:	
and	:	
JAMES J. WEST, ESQUIRE	:	
<i>Defendants.</i>	:	
CARL GURLEY, et al.	:	CIVIL ACTION
<i>Plaintiffs,</i>	:	NO. 89-2685
v.	:	
BARBARA HAFER	:	
<i>Defendant</i>	:	

APPENDIX OF EXHIBITS TO  
BARBARA HAFER'S MEMORANDUM IN SUPPORT  
OF HER MOTION FOR SUMMARY JUDGMENT

Dated: August 9, 1989

Jerome R. Richter, Esquire  
Jay W. Eisenhofer, Esquire  
BLANK, ROME, COMISKY & MCCAULEY  
1200 Four Penn Center Plaza  
Philadelphia, PA 19103  
(215) 569-5500

Attorneys for Defendant,  
Pennsylvania Auditor General  
Barbara Hafer



## INDEX OF EXHIBITS

<u>TAB</u>	<u>EXHIBITS</u>
1	Answer and Counterclaim of Defendant Barbara Hafer including John Kerr's Affidavit as Exhibit "A".
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5	Letter from James West to Barbara Hafer dated 10/19/88.
6	WQED-People's Business Auditor-General Debate Transcript recorded on 10/24/89.
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8	Letter dated 10/28/88 from Barbara Hafer to James West.
9	Letter dated 10/4/88 from Charles Lewis to James West.
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11	Letter dated 11/23/88 from James West to Barbara Hafer.
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34	Termination Letter of George A. Franklin dated February 21, 1989.
35	Section 204, "Demotions and Suspensions" and Section 301 "Resignation" of Employee Handbook.
36	Article 29 "Discharge, Demotion, Suspension and Discipline" of the Collective Bargaining Agreement.

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JAMES C. MELO, JR.	:	CIVIL ACTION
	:	
<i>Plaintiff,</i>	:	NO. 89-2935
	:	
v.	:	
	:	
BARBARA HAFFER	:	JURY TRIAL
and	:	DEMANDED
JAMES J. WEST, ESQUIRE	:	
<i>Defendants.</i>	:	

**AFFIDAVIT OF JOHN M. KERR**

I, JOHN M. KERR, subject to the penalties of 18 Pa.C.S. §4904, hereby declare the following to be true and correct to the best of my knowledge, information and belief:

1. From 1977 until early 1983, I served as the appointed Executive Deputy Auditor General, second in command to the elected Auditor General, Alfred Benedict.

2. The Department of the Auditor General is the office of the Commonwealth of Pennsylvania empowered and required under Pennsylvania law to audit, examine and report upon the use of Commonwealth funds; adjust claims against the Commonwealth; settle and collect accounts of Commonwealth officers; act as a member of the Board of Finance and Revenue; and to hire and appoint employees to assist him in the execution of these duties.

The duties of the Auditor General are designed to insure that all money to which the Commonwealth is entitled is deposited in the State Treasury and to make certain that the public money is disbursed legally and properly.

3. On January 25, 1982, following the issuance of a presentment by the Multi-County Investigating Grand Jury, the Attorney General of Pennsylvania filed a Criminal Information charging me with multiple counts of Bribery in Official and Political Matters, 18 Pa.C.S. §4701, Conflict of Interest, 65 P.S. §403(a) and (b), Criminal Attempt, 18 Pa.C.S. §901, Macing, 25 P.S. §§2374 and 2375, Obstructing the Administration of Law or Other Governmental Function, 18 Pa.C.S. §5101, Demanding

Property to Secure Employment, 18 Pa.C.S. §7322, Criminal Solicitation, 18 Pa.C.S. §902, and Criminal Conspiracy, 18 Pa.C.S. §903, in connection with job-selling in the Auditor General's Office.

Following an eleven-day trial, commencing on June 18, 1984, I was found guilty on June 29, 1984 on 139 counts of such charges, and on April 11, 1985, was sentenced to imprisonment on such charges of not less than two nor more than five years.

4. From early 1984, until January, 1989, James C. McAneny ("McAneny") served as Chief Counsel to the Department of the Auditor General.

Prior to serving as Chief Counsel, McAneny engaged in private law practice in Reading, Pennsylvania, in the office of Calvin Lieberman, ("Lieberman") Esquire, who represented me in connection with the then-ongoing grand jury investigation of the "job-selling scheme" in the Auditor General's office.

5. I was aware that McAneny was being considered for the position of Chief Counsel to the Department, and did not object to that appointment.

6. Harold Imber, then Director of Tax and Revenue Audits for the Department, was instrumental in obtaining for McAneny his position with the Auditor General's office.

7. Imber discussed this matter with me, prior to McAneny being hired.

8. Imber was actively involved at that time in soliciting political funds for Al Benedict, and had influence in personnel decisions.

9. The scheme for which I was convicted involved the selling of jobs in the Department of the Auditor General from which Al Benedict and I personally and professionally profited.

10. The job-selling was handled directly by me with the collaboration and cooperation of Al Benedict.

11. In addition, we were further involved in the selling of job promotions and consequent salary increases within the Department of the Auditor General.

12. Al Benedict and I personally and professionally profited from the sale of job promotions as well.

13. The selling of job promotions was handled directly by me with the collaboration, cooperation and knowledge of Al Benedict.

14. The procedure by which the job and promotion selling scheme operated was that I would take the job application to the Department of the Auditor General Personnel Office, and advise Russell Biggica, the Personnel Director at that time, or Eric Slater, the Assistant Personnel Director at that time that a particular applicant should be interviewed.

15. Neither Russell Biggica or Eric Slater were aware that a particular applicant had paid money to me and Al Benedict for his/her job, but they did understand that the applicant should be hired by the Department of the Auditor General.

16. The applicant was subsequently interviewed, usually by Eric Slater, and approximately four months after the receipt of the application and cash by me, the applicant was hired to a position in the Department of the Auditor General.

17. An individual who obtained a promotion with the Department of the Auditor General as a result of this job-selling scheme was James C. Melo, Jr.

18. Melo obtained a promotion from Field Auditor I to Field Auditor III in 1978 by virtue of \$2,700 in cash paid to me by Melo's relative, "Reds" Barbone.

19. As noted above, prior to his employment as Chief Counsel to the Department of the Auditor General, McAneny, while engaged in the private practice of law, had been associated with Calvin Lieberman ("Lieberman"), Esquire, whose law practice was located in Reading, Pennsylvania. Lieberman subsequently was elected a judge of the Court of Common Pleas of Berks County, Pennsylvania, and served on the bench until he resigned in 1988.

20. While McAneny was associated with Lieberman in the private practice of law, Lieberman acted as my legal counsel in connection with the then-ongoing grand jury investigation into job-selling activities within the Department of the Auditor General. As my counsel, Lieberman rendered legal advice to me regarding my activities in receiving payments of money in return for hiring and promoting individuals in the Department of the Auditor General. As an associate in Lieberman's office,

McAneny performed various tasks in connection with this representation and had access to confidential files and communications concerning the investigation.

21. This affidavit has been given of my own free will, and is not the result of any promise of favorable treatment by anyone, including the United States Attorney.

  
JOHN M. KERR

Dated: June 14, 1989



**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JAMES C. MELO, JR., et al. : CIVIL ACTION  
*Plaintiffs,* :  
v. : NO. 89-2935

BARBARA HAFFER

and

JAMES J. WEST, ESQUIRE  
*Defendants.*

CARL GURLEY, et al. : CIVIL ACTION  
*Plaintiffs,* :  
v. : NO. 89-2685

BARBARA HAFFER  
*Defendant.*

## DECLARATION OF DEFENDANT BARBARA HAER

I, Barbara Hafer hereby declare under the penalties of perjury pursuant to 28 U.S.C. §1746 that the following is true to the best of my information, knowledge and belief:

1. I am one of the named defendants in *James C. Melo, Jr. et al. v. Barbara Hafer and James J. West*, C.A. No. 89-2935, currently pending in the United States District Court for the Eastern District of Pennsylvania and I am the only named defendant in *Carl Gurley. et al. v. Barbara Hafer*, Civil Action No.89-2685, also pending in the United States District Court for the Eastern District of Pennsylvania. I am submitting this Declaration in Support of the Defendant's Motion for Summary Judgment and the statements contained in this Declaration are all made on the basis of my own personal knowledge.

2. I was elected Auditor General of the Commonwealth of Pennsylvania in 1988 following my nomination during 1988 as a candidate for that position by the Republican Party. I was inaugurated as Auditor General on January 17, 1989 and have served as Auditor General of Pennsylvania since that date.

3. During the campaign for the post of Auditor General in 1988, it came to my attention from newspaper articles attached to this motion as Exhibit "2" that the current Auditor General against whom I was running in that election, Donald Bailey, had received information from James J. West, acting United States Attorney for the Middle District of Pennsylvania, that numerous employees of the Auditor General's office had been hired or received promotions as a result of payments made to senior officials in the Auditor General's office including former Auditor General Al Benedict and former First Deputy Auditor General John Kerr.

4. On October 6th, 1988 I sent a written request to West requesting that he provide to me the list of individuals who purportedly had purchased jobs or promotions with the Department during Benedict's tenure and who were still employed in the Department. A true and correct copy of this letter is attached to this motion as Exhibit "4".

5. Though Mr. West had previously provided this list to Auditor General Bailey, he declined to provide it to me on the grounds that I was merely a candidate for Auditor General while Mr. Bailey was the actual holder of the office.

6. On October 19, 1988, Mr. West responded to my request for the individual names via correspondence stating:

I have also thoroughly considered your request to have the names of the twenty-one individuals that I identified in January of 1988 for Auditor General Bailey as job purchasers made available to you, and regret that I concluded that isn't possible at the present time. This information was gathered during an official investigation by the Federal Bureau of Investigation and basically from the debriefings of former Auditor General Al Benedict and John Kerr. The information was turned over to Auditor General Bailey in January because he is the only person in an official position

able to institute and direct appropriate administrative action against these people. Compliance with your request, on the other hand, could result in a general disclosure of these names and their use in a pending political campaign. This would not be an appropriate use of official materials gathered by the Federal Bureau of Investigation and forms the basis of why we must treat your request for disclosure differently than Mr. Bailey's.

A true and correct copy of West's letter is attached to this motion as Exhibit "5".

7. The only other contact I had with Mr. West prior to the election was: (1) a telephone conversation with Mr. West during which he informed me of his forthcoming October 19, 1988 letter and told me that he had declined to provide me with a copy of the list for the reasons cited in his letter; and (2) a letter sent by me on October 28th to Mr. West, a true and correct copy of which is attached to this motion as Exhibit "8"

8. Based upon information I received during the campaign, I compiled a list of persons, who were suspected job-buyers as well as persons who had allegedly been maced by Mr. Bailey in that he had required them to make political contributions to his campaigns in return for continued employment with the department. I provided this list to Mr. West as an attachment to my letter of October 6, 1988.

9. Additional names were supplied by me to West with my letter of October 28, 1989.

10. Also, on October 4, 1988, my campaign manager, Charles Lewis sent a letter to West stating that our campaign was aware of certain individuals who had been maced by Auditor General Bailey. A true and correct copy of this letter is attached to this motion as Exhibit "9"

11. During the campaign, I had on several occasions made reference to the job-buying scheme. In particular, I referred to the scheme and the communications between Don Bailey and James West concerning the presence of job-buyers in the Department during a debate televised by WQED (Pittsburgh), a partial transcript of which is attached to this affidavit as Exhibit "6".

12. During this debate, I stated:

There are a list of twenty (20) names of people that bought their jobs given to you [Bailey] by Jim West, the U.S. Attorney of the Middle District. He sent me a letter responding to the information I gathered about people that bought their jobs. . . .

\* \* \*

I also stated:

We had twenty people named by the U.S. Attorney as having bought their jobs. Bailey's done nothing about it. That list was given to him by his request.

\* \* \*

Furthermore, I said:

Those twenty names were given to you by Jim West at your request. I have the letter — the transmittal letter. I talked to Mr. West last week, he said "not only did he give you the information, he gave you specific instructions to proceed with the investigation and punish those people as you saw fit".

13. My original knowledge that a list of suspected job-buyers had been provided to Bailey by U.S Attorney West came from newspaper reports, such as those attached hereto as Exhibit "2". These reports incorrectly stated that the list provided to Bailey contained twenty (20) names, rather than the twenty-one (21) names actually provided to Bailey. Because my information came from newspaper reports, I incorrectly referred to the "list of twenty names". The transmittal letter which is referred to above is the letter of James West to me dated October 19, 1988, a true and correct copy of which is attached to this motion as Exhibit "5". This transmittal letter plainly states that Mr. West provided to Mr. Bailey the list of suspected job-buyers on January 21, 1988 though Mr. West declined to provide that list to me because at the time of my request I was only a candidate for Auditor General.

14. On November 15, 1988, following my election as Auditor General, I again wrote to Mr. West regarding this matter. At that time, I renewed my request for the list of persons which had previously been transmitted to Auditor General Bailey. A true and correct copy of this letter is attached to this motion as Exhibit "10". But Mr. West declined to provide



me with that list even though I had recently won election as Auditor General and was to assume that office in January of 1989. Mr. West requested that I obtain the information directly from the files of the Auditor General's office though he did agree to meet with me following my inauguration. A true and correct copy of this letter, dated November 23, 1988, is attached to this motion as Exhibit "11".

15. Following my inauguration, I did meet with Mr. West on January 18, 1989 to discuss the results of the United States Attorney's investigation into corruption at the Auditor General's office. By that time, I had already obtained Mr. West's correspondence to Bailey from files left in the Auditor General's office.

16. These files showed that on January 21, 1988, West had written to Bailey and identified certain individuals who were employed by the Department who had paid or been the beneficiaries of the payments of substantial sums to obtain jobs or promotions with the Department. A true and correct copy of this letter is attached to this motion as Exhibit "12".

17. By a letter dated June 21, 1988, Mr. West advised Auditor General Bailey that "there is no longer any reason for him to refrain from taking appropriate action" against such individuals that remain employed by the Department. A true and correct copy of this letter is attached to this motion as Exhibit "13". Attached to this letter were summaries prepared by the Federal Bureau of Investigation detailing the job-buying scheme as it pertained to persons still employed by the Office of Auditor General. True and correct copies of these FBI summaries are attached to this motion as Exhibit "14".

18. The Department's files showed that following receipt of this letter, Auditor General Bailey authorized his chief counsel, James J. McAneny, to conduct an internal investigation of the job selling scheme. These files demonstrated that Mr. McAneny's investigation consisted merely of cursory interviews of the individuals identified as job buyers. Mr. McAneny apparently never interviewed a single intermediary or John Kerr in connection with his investigation. But the transcript of Mr. McAneny's interviews with the employees do reflect that he informed each employee of the allegations against them and

gave them an opportunity to respond to those allegations. A true and correct copy of the transcripts of the interviews conducted pursuant to this investigation are attached to this motion as Exhibit "16".

19. Following my inauguration, I also authorized an independent investigation of the job-buying scheme which included in part thereof a review of: (1) the records of the criminal prosecutions of Kerr and Benedict; (2) the FBI records relating to the job-selling scheme; (3) the records of the Bailey administration "investigation"; (4) an interview with Kerr; (5) a review of information provided by the Pennsylvania Attorney General; (6) interviews of West and agents of the Federal Bureau of Investigation; and (7) all other relevant departmental records.

20. On February 1, 1989, after reviewing the information discussed above and the results of Bailey and McAneny's investigation, I terminated the employment of eighteen individuals who either made, or were beneficiaries of substantial sums paid to obtain jobs or promotions with the Department.

21. I announced these terminations via a press release stating:

"Today I am dismissing 18 employees of the Auditor General's Office who, evidence shows, benefited from the job-and-promotion-selling scandal that has preoccupied this office for nearly a decade. The actions I am announcing today will go a long way towards concluding one of the most complicated investigations involving the misuse of the public's trust in our state's history."

Speaking at a news conference here, Hafer said the terminations were based on information provided by the U.S. Attorney's Office, the state attorney general's office and new material developed by her staff while pursuing existing evidence. Hafer said that some members of her staff have spent the bulk of the past two weeks sifting through the information.

"That information," Hafer said, "substantiates charges that the individuals either bought their jobs or promotions directly or through third parties."



Termination notices are being delivered to the individuals, directing them to vacate their positions and offices by 5:00 P.M. today, according to Hafer.

Today's action, according to Hafer, was the only way to lift the cloud of suspicion that has hung over those hard-working and dedicated employees of the Auditor General's Office.

Hafer said the buying of jobs and promotions subverts the laws and procedures that are in place to ensure that everyone has fair and equal access to state employment.

"Faced with evidence of such blatant disregard of law, public policy and the concept of fundamental fairness, I have ordered the removal of these individuals," Hafer said. "It is simply the right thing to do . . . it is consistent with my obligation to serve the public's interest."

Among the documents Hafer's staff examined was a list given to Don Bailey last January by Acting U.S. Attorney James West. The list contained the names of 21 individuals who benefited from the job-and-promotion-selling ring. Further investigation resulted in four new names being added to that list.

Of the total of 25: one is in prison (Harold Imber); two, who previously were fired because of their involvement in the job-selling scheme, have been reinstated to their positions through arbitration; and four have resigned or retired. The 18 remaining employees are being terminated as of close of business February 1.

"My predecessor chose to take no action," Hafer said. "So the responsibility for dealing with the situation has fallen to my administration."

"Today I have taken action which I believe will begin to restore the stature of this department. It is a vital first step in re-establishing the public's trust in the Office of Auditor General."

A true and correct copy of this press release is attached to this motion as Exhibit "18".

22. Several of the plaintiffs in these cases were terminated because they were implicated in the job-buying scheme, including:

James Melo;  
John Weikel;  
Lucille Russell;  
Waiter Speelman;  
Don Ruggerio;  
James DiCosimo;  
Louise Jurek; and  
Karol Danowitz

23. James Melo began employment in the department of the Auditor General on October 11, 1977, as a Field Auditor I, at an annual salary of \$10,367.00. In late 1978, \$2,700.00 was paid to Kerr by "Reds" Barbone, a beer distributor and relative of Melo's for a promotion for Melo. As a result of this payment, Melo was subsequently promoted from a Field Auditor I to a Field Auditor III, thereby receiving a significant boost in salary.

I terminated Melo's employment on February 1, 1989 via correspondence sent to Melo's home address in Bensalem, Pennsylvania stating:

Effective the close of business at 5:00 p.m. on Wednesday, February 1, 1989 your employment as a Field Auditor IV, Bureau of County Audits, in the Auditor General's Office will be terminated.

This action is necessary based on information gathered by my office as well as through cooperation with other governmental agencies as the result of an investigation into your involvement in a job-buying and/or job promotion scheme in the Auditor General's Office.

Please return all Commonwealth Property to the Auditor General's Personnel Office and complete all separation documents.

The letter was signed by me and placed in Melo's personnel file. It has not been shown to anyone nor will it be distributed to anyone in the future.

I was unaware of Melo's political affiliation until he filed this action and claimed to be a registered Democrat.

The information in this paragraph is based upon the investigation and review described in paragraph 19 above and the FBI summaries attached as Exhibit "14".

24. In late summer 1983, Rachel Marte ("Marte"), Weikel's mother-in-law, paid Dennis Sabo ("Sabo"), a Dauphin County Benedict Coordinator, \$1,500 cash of which \$1,000 cash was paid to Kerr by Sabo. As a result of this payment, John Weikel began employment in the Department of the Auditor General on October 17, 1983 as a Clerk I at an annual salary of \$10,347.00.

I terminated Weikel's employment on February 1, 1989 via correspondence sent to Weikel's home address in Bensalem, Pennsylvania stating:

Effective the close of business at 5:00 p.m. on Wednesday, February 1, 1989 your employment as a Stock Clerk II, Bureau of Supplies and Maintenance, in the Auditor General's Office will be terminated.

This action is necessary based on information gathered by my office as well as through cooperation with other governmental agencies as the result of an investigation into your involvement in a job-buying and/or job promotion scheme in the Auditor General's Office.

Please return all Commonwealth Property to the Auditor General's Personnel Office and complete all separation documents.

The letter was signed by me and placed in Weikel's personnel file. It has not been shown to anyone nor will it be distributed to anyone in the future.

I was unaware of Weikel's political affiliation until he filed this action and claimed to be a registered Democrat.

The information in this paragraph is based upon the investigation and review described in paragraph 19 above and the FBI summaries attached as Exhibit "14".

25. In late 1979, Robert Russell, Lucille Russell's husband, made a \$1,000 cash payment to Al Benedict's campaign fund. As

a result of this payment, Lucille Russell began employment in the Department of the Auditor General on January 14, 1980 as a Field Auditor I at an annual salary of \$14,611.00. I terminated Russell's employment on February 1, 1989 via correspondence sent to Russell's home address in Bensalem, Pennsylvania stating:

Effective the close of business at 5:00 p.m. on Wednesday, February 1, 1989 your employment as a Field Auditor III, Bureau of School Audits in the Auditor General's office will be terminated.

This action is necessary based on information gathered by my office as well as through cooperation with other governmental agencies as the result of an investigation into your involvement in a job-buying and/or job promotion scheme in the Auditor General's Office.

Please return all Commonwealth Property to the Auditor General's Personnel Office and complete all separation documents.

The letter was signed by me and placed in Russell's personnel file. It has not been shown to anyone nor will it be distributed to anyone in the future.

I was unaware of Russell's political affiliation until she filed this action and claimed to be a registered Democrat.

The information in this paragraph is based upon investigation and review described in paragraph 19 above and the FBI summaries attached as Exhibit "14".

26. In late summer 1980, Rachel Marte ("Marte"), Walter Speelman's mother-in-law, paid Dennis Sabo ("Sabo"), a Dauphin County Benedict Coordinator, \$1,500 cash, of which \$1,000 cash was paid to Kerr by Sabo. As a result of this payment, Walter Speelman began employment in the Department of Auditor General on September 22, 1980 as a Liquor Store Examiner I at an annual salary of \$12,968.

I terminated Speelman's employment on February 1, 1989 via correspondence sent to Speelman's home address in Bensalem, Pennsylvania stating:



Effective the close of business at 5:00 p.m. on Wednesday, February 1, 1989 your employment as a Liquor Store Examiner II, Bureau of Liquor Audits in the Auditor General's Office will be terminated.

This action is necessary based on information gathered by my office as well as through cooperation with other governmental agencies as the result of an investigation into your involvement in a job-buying and/or job promotion scheme in the Auditor General's Office.

Please return all Commonwealth Property to the Auditor General's Personnel Office and complete all separation documents.

The letter was signed by me and placed in Speelman's personnel file. It has not been shown to anyone nor will it be distributed to anyone in the future.

I was unaware of Speelman's political affiliation until he filed this action and claimed to be a registered Democrat.

The information in this paragraph is based upon the investigation and review described in paragraph 19 above and the FBI summaries attached as Exhibit "14".

27. In January 1977, \$1,000 was paid to Kerr by Richard Walton ("Walton"), the Columbia County Democratic Chairman, for a job for Don Ruggerio. As a result of this payment, Ruggerio began employment in the Department of the Auditor General on February 14, 1977 as a Field Auditor I at an annual salary of \$10,367.

I terminated Ruggerio's employment on February 1, 1989 via correspondence sent to Ruggerio's home address in Bensalem, Pennsylvania stating:

This letter is to advise you that your position as a Field Auditor II, Bureau of County Audits in the Auditor General's Office is hereby terminated, effective Wednesday, February 1, 1989, 5:00 p.m., subject to any rights you may have as a result of any Workman's Compensation determination.

Please arrange to return all Commonwealth Property to the Auditor General's Personnel Office and complete all separation documents at your earliest convenience.

The letter was signed by me and placed in Ruggerio's personnel file. It has not been shown to anyone nor will it be distributed to anyone in the future.

I was unaware of Ruggerio's political affiliation until he filed this action and claimed to be a registered Democrat.

The information in this paragraph is based upon the investigation and review described in paragraph 19 above and the FBI summaries attached as Exhibit "14".

28. In late 1980, DiCosimo made a cash payment of approximately \$1,000 to Kerr. As a result of this payment, James DiCosimo began employment in the Department of the Auditor General on January 14, 1980 as a Field Auditor at an annual salary of \$15,863.00.

I terminated DiCosimo's employment on February 1, 1989 via correspondence sent to DiCosimo's home address in Bensalem, Pennsylvania stating:

Effective the close of business at 5:00 p.m. on Wednesday, February 1, 1989 your employment as a Field Auditor III, Bureau of County Audits in the Auditor General's Office will be terminated.

This action is necessary based on information gathered by my office as well as through cooperation with other governmental agencies as the result of an investigation into your involvement in a job-buying and/or job promotion scheme in the Auditor General's Office.

Please return all Commonwealth Property to the Auditor General's Personnel Office and complete all separation documents.

The letter was signed by me and placed in DiCosimo's personnel file. It has not been shown to anyone nor will it be distributed to anyone in the future.

I was unaware of DiCosimo's political affiliation until he filed this action and claimed to be a registered Democrat.



The information in this paragraph is based upon the investigation and review described in paragraph 19 above and the FBI summaries attached as Exhibit "14".

29. Louise Jurik began employment in the Department of the Auditor General on August 7, 1972 as a Field Auditor Trainee at an annual salary of \$7,055.00. Prior to February, 1983, a cash payment was made to Kerr by John Lignelli, for a promotion for Jurik, who was at that time employed as a Field Auditor II. As a result of this bribe, on February 22, 1983, Jurik was subsequently promoted from a Field Auditor II to a Field Auditor III.

I terminated Jurik's employment on February 1, 1989 via correspondence sent to Jurik's home address in Bensalem, Pennsylvania stating:

Effective the close of business at 5:00 p.m. on Wednesday, February 1, 1989 your employment as a Field Auditor III, Bureau of School Audits in the Auditor General's office will be terminated.

This action is necessary based on information gathered by my office as well as through cooperation with other governmental agencies as the result of an investigation into your involvement in a job-buying and/or job promotion scheme in the Auditor General's Office.

Please return all Commonwealth Property to the Auditor General's Personnel Office and complete all separation documents.

The letter was signed by me and placed in Jurik's personnel file. It has not been shown to anyone nor will it be distributed to anyone in the future.

I was unaware of Jurik's political affiliation until she filed this action and claimed to be a registered Democrat.

The information in this paragraph is based upon the investigation and review described in paragraph 19 above and the FBI summaries attached as Exhibit "14".

30. In late 1980, Karol Danowitz' husband, Harvey Danowitz, made a \$3,000 cash payment through an intermediary that was received by Kerr. As a result of this payment, Karol

Danowitz began employment in the Department of the Auditor General on December 1, 1980 as a Clerk I at an annual salary of \$9,526.

I terminated Danowitz' employment on February 1, 1989 via correspondence sent to Danowitz' home address in Bensalem, Pennsylvania stating:

Effective the close of business at 5:00 p.m. on Wednesday, February 1, 1989 your employment as a Clerk I, Bureau of Files and Records, in the Auditor General's Office will be terminated.

This action is necessary based on information gathered by my office as well as through cooperation with other governmental agencies as the result of an investigation into your involvement in a job-buying and/or job promotion scheme in the Auditor General's Office.

Please return all Commonwealth Property to the Auditor General's Personnel Office and complete all separation documents.

The letter was signed by me and placed in Danowitz' personnel file. It has not been shown to anyone nor will it be distributed to anyone in the future.

I was unaware of Danowitz' political affiliation until she filed this action and claimed to be a registered Democrat.

The information in this paragraph is based upon the investigation and review described in paragraph 19 above.

31. I also terminated numerous other individuals as part of a managerial overhaul of the Department on February 21, 1989.

32. After reviewing the performance of the department under my predecessor Bailey, I determined that I needed Bureau Chiefs who would assume more responsibility than they were required to in the past and who would carry out my policies and manage the department in a professional and efficient manner. Therefore, I decided to terminate all fourteen (14) persons who were Bureau Chiefs during the Bailey administration. All but two (2) of these persons were replaced from

within the department. All of the second group of employee-plaintiffs are persons who were dismissed as part of this reorganization and all but Carl Gurley and Daniel Clemson were bureau chiefs.

33. Carl Gurley was employed by the Office of Auditor General as an investigator until I terminated him on February 21, 1989 as a result of a managerial overhaul of the Department. Mr. Gurley was terminated via correspondence sent to his home address in Philadelphia, Pennsylvania which stated:

Please be advised that effective Tuesday February 21, 1989 at 5:00 p.m. your services will no longer be required by the Department of Auditor General. I would like to thank you for your service to this agency and wish you the best of success in your future endeavors.

Please return all Commonwealth Property to the Office of Personnel and make arrangements with that office to accommodate the processing of your paperwork.

The letter was signed by me and placed in Gurley's personnel file. It has not been shown to anyone nor will it be distributed to anyone in the future.

I was unaware of Gurley's political affiliation until he filed this action and claimed to be a registered Democrat.

34. W. Gerard Best was employed by the Office of Auditor General as a Bureau Director until I terminated him on February 21, 1989 as a result of a managerial overhaul of the Department. Mr. Best was terminated via correspondence sent to his home address in Philadelphia, Pennsylvania which stated:

Please be advised that effective Tuesday, February 21, 1989 at 5:00 p.m. your services will no longer be required by the Department of Auditor General. I would like to thank you for your services to this agency and wish you the best of success in your future endeavors.

Please return all Commonwealth Property to the Office of Personnel and make arrangements with that office to accommodate the processing of your paperwork.

The letter was signed by me and placed in Best's personnel file. It has not been shown to anyone nor will it be distributed to anyone in the future.

I was unaware of Best's political affiliation until he filed this action and claimed to be a registered Democrat.

35. Michael Brennan was employed by the Office of Auditor General as Director of the Bureau of Audits until I terminated him on February 21, 1989 as a result of a managerial overhaul of the Department. Mr. Brennan was terminated via correspondence sent to his home address in Pottsville, Pennsylvania which stated:

Please be advised that effective Tuesday, February 21, 1989 at 5:00 p.m. your services will no longer be required by the Department of Auditor General. I would like to thank you for your service to this agency and wish you the best of success in your future endeavors.

Please return all Commonwealth Property to the Office of Personnel and make arrangements with that office to accommodate the processing of your paperwork.

The letter was signed by me and placed in Brennan's personnel file. It has not been shown to anyone nor will it be distributed to anyone in the future.

I was unaware of Brennan's political affiliation until he filed this action and claimed to be a registered Democrat.

36. Margaret Casper was employed by the Office of Auditor General as Director of the Bureau of Support Services until I terminated her on February 21, 1989 as a result of a managerial overhaul of the Department. Ms. Casper was terminated via correspondence sent to her home address in Palmyra, Pennsylvania which stated:

Please be advised that effective Tuesday, February 21, 1989 at 5:00 p.m. your services will no longer be required by the Department of Auditor General. I would like to thank you for your service to this agency and wish you the best of success in your future endeavors.



Please return all Commonwealth Property to the Office of Personnel and make arrangements with that office to accommodate the processing of your paperwork.

The letter was signed by me and placed in Casper's personnel file. It has not been shown to anyone nor will it be distributed to anyone in the future.

I was unaware of Casper's political affiliation until she filed this action and claimed to be a registered Democrat.

37. Elizabeth Buchmiller was employed by the Office of Auditor General as Director of State-Owned Institution Audits until I terminated her on February 21, 1989 as a result of a managerial overhaul of the Department. Ms. Buchmiller was terminated via correspondence sent to her home address in Whitehall, Pennsylvania which stated:

Please be advised that effective Tuesday February 21, 1989 at 5:00 p.m. your services will no longer be required by the Department of Auditor General. I would like to thank you for your service to this agency and wish you the best of success in your future endeavors.

Please return all Commonwealth Property to the Office of Personnel and make arrangements with that office to accommodate the processing of your paperwork.

The letter was signed by me and placed in Buchmiller's personnel file. It has not been shown to anyone nor will it be distributed to anyone in the future.

I was unaware of Buchmiller's political affiliation until she filed this action and claimed to be a registered Democrat.

38. Daniel Clemson was employed by the Office of Auditor General as an Assistant Director of the Bureau of School Audits until I terminated him on February 21, 1989 as a result of a managerial overhaul of the Department. Mr. Clemson was terminated via correspondence sent to his home address in Mechanicsburg, Pennsylvania which stated:

Please be advised that effective Tuesday February 21, 1989 at 5:00 p.m. your services will no longer be required by the Department of Auditor General. I would like to thank you

for your service to this agency and wish you the best of success in your future endeavors.

Please return all Commonwealth Property to the Office of Personnel and make arrangements with that office to accommodate the processing of your paperwork.

The letter was signed by me and placed in Clemson's personnel file. It has not been shown to anyone nor will it be distributed to anyone in the future.

I was unaware of Clemson's political affiliation until he filed this action and claimed to be a registered Democrat.

39. Mary Fager was employed by the Office of Auditor General as Director of the Bureau of Federal Audits until I terminated her on February 21, 1989 as a result of a managerial overhaul of the Department. Ms. Fager was terminated via correspondence sent to her home address in Harrisburg, Pennsylvania which stated:

Please be advised that effective Tuesday, February 21, 1989 at 5:00 p.m. your services will no longer be required by the Department of Auditor General. I would like to thank you for your service to this agency and wish you the best of success in your future endeavors.

Please return all Commonwealth Property to the Office of Personnel and make arrangements with that office to accommodate the processing of your paperwork.

The letter was signed by me and placed in Fager's personnel file. It has not been shown to anyone nor will it be distributed to anyone in the future.

I was unaware of Fager's political affiliation until she filed this action and claimed to be a registered Democrat.

40. George Franklin was employed by the Office of Auditor General as Director of the Bureau of Municipal Pension Audits until I terminated him on February 21, 1989 as a result of a managerial overhaul of the Department. Mr. Franklin was terminated via correspondence sent to his home address in Harrisburg, Pennsylvania which stated:



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Please be advised that effective Tuesday, February 21, 1989 at 5:00 p.m. your services will no longer be required by the Department of Auditor General. I would like to thank you for your service to this agency and wish you the best of success in your future endeavors.

Please return all Commonwealth Property to the Office of Personnel and make arrangements with that office to accommodate the processing of your paperwork.

The letter was signed by me and placed in Franklin's personnel file. It has not been shown to anyone nor will it be distributed to anyone in the future.

I was unaware of Franklin's political affiliation until he filed this action and claimed to be a registered Democrat.

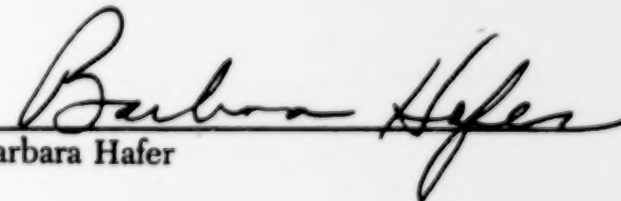
41. At no time have I been aware of the political affiliations of any of the plaintiffs nor did political affiliation play any part in my decision to discharge them from their positions with the Office of Auditor General.

42. And I have been informed that the plaintiffs' personnel records do not contain any information concerning political affiliation.

43. Each of the suspected job-buyers learned of the allegations against them and had an opportunity to respond to those allegations prior to their discharges as they were apprised of the charges during the Bailey administration's investigation.

44. As the elected Auditor General of the Commonwealth of Pennsylvania, it is my responsibility to make all final personnel and policy decisions for the Department. My decision to terminate the job-buyers and the other ex-employee-plaintiffs was a policy decision made by myself alone.

45. At all times relevant to this matter, in making and carrying out the aforementioned policy decisions, I was acting within the scope of my employment as Auditor General of Pennsylvania.

  
Barbara Hafer

Dated 8/7/89

JA-83

**U.S. Department of Justice**  
**United States Attorney**  
**Middle District of Pennsylvania**

*Federal Building, 228 Walnut Street*  
*Post Office Box 11754*  
*Harrisburg, Pennsylvania 17108*

717/782-4482  
FTS/590-4482

October 19, 1988

Barbara Hafer  
P.O. Box 2742  
Pittsburgh, PA 15230

Dear Ms. Hafer:

This will acknowledge receipt of letters earlier this month from your Campaign Manager and yourself relating to the job sale scheme at the Pennsylvania State Auditor General's Office.

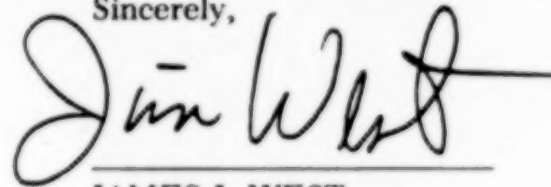
I have reviewed the materials provided by your Campaign Manager with great interest and have forwarded them to the Harrisburg resident agency of the Federal Bureau of Investigation for whatever follow up inquiry they deem as appropriate.

I have also thoroughly considered your request to have the names of the 21 individuals that I identified in January of 1988 for Auditor General Bailey as job purchasers made available to you, and regret I have concluded that is impossible at the present time. This information was gathered during an official investigation by the Federal Bureau of Investigation and comes basically from the debriefings of former Auditor General Al Benedict and John Kerr. The information was turned over to Auditor General Bailey in January because he is the only person in an official position to institute and direct appropriate administrative action against these people. Compliance with your request, on the other hand, could result in the general disclosure of these names and their use in the pending political campaign. This would not be an appropriate use of official materials gathered by the Federal Bureau of Investigation and forms the basis of why we must treat your request for disclosure differently than Mr. Bailey's.

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In the event that you are successful in your quest for the Auditor General's Office, I will be pleased to cooperate with you in this matter as well as in all other matters of mutual interest.

Sincerely,



JAMES J. WEST  
United States Attorney

cc: Mr. Charles Lewis  
P.O. Box 2742  
Pittsburgh, PA  
  
David Malarney  
Federal Bureau of Investigation

JA-85

U.S. Department of Justice

United States Attorney  
Middle District of Pennsylvania

Federal Building, 228 Walnut Street  
Post Office Box 11754  
Harrisburg, Pennsylvania 17108

717/782-4482  
FTS/590-4482

November 23, 1988

Honorable Barbara Hafer  
Auditor General Elect  
P.O. Box 2742  
Pittsburgh, PA 14230

Dear Ms. Hafer:

Congratulations on your election as Auditor General of Pennsylvania. I am personally looking forward to working with you in all matters of mutual concern and assisting you, within the limits of my legal authority, in the numerous important tasks which are ahead of you. I also know that I speak for the federal investigative agencies and their career professional personnel in this regard.

In response to your recent letter, I am enclosing herein several miscellaneous documents, from the public record, which cover some of the high-points of the investigation into corruption in the Auditor General's office. I will be pleased to meet with you at any mutually convenient time and location to discuss these matters of public record and am grateful that you have shown an interest in these matters.

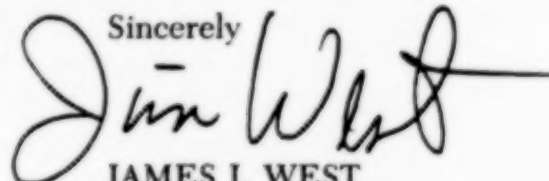
At this proposed meeting, I would like to discuss with you your request for information concerning job purchasers who are still employees of the Auditor General's office. As you are aware, there are many allegations and cross-allegations arising out of the Imber investigation, some of which are presently under investigation by the Department of Justice Office of Professional Responsibility. Moreover, at the request of your predecessor, I requested the FBI to prepare and provide letter memoranda to the Auditor General of Pennsylvania fully summarizing relevant information concerning present employees involved in the job sale scheme. Rather than going through a completely new

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disclosure process, it is preferable, from my perspective, that the information already provided be turned over to you by the Auditor General's office. I do not wish to elevate form over substance, but I do believe that we should fully discuss the best method for you to obtain this information.

If you could have someone from your staff contact Carol Simpson at my Harrisburg office (717-782-4482), she is fully knowledgeable about my schedule and could arrange a mutually convenient time for us to meet and discuss these matters. It would be my intention to have the case agent, George Delaney, from the Harrisburg resident agency of the FBI present at this particular meeting and, likewise, you may wish to bring someone from your staff.

Again, congratulations on your great victory, and I look forward to our meeting in the near future.

Sincerely  
  
JAMES J. WEST  
United States Attorney

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**U.S. Department of Justice**  
**United States Attorney**  
**Middle District of Pennsylvania**

*Federal Building, 228 Walnut Street*  
*Post Office Box 11754*  
*Harrisburg, Pennsylvania 17108*

717/782-4482  
FTS/590-4482

**PERSONAL AND CONFIDENTIAL**

January 21, 1988

Don Bailey  
Auditor General of Pennsylvania  
Office of the Auditor General  
229 Finance Building  
Harrisburg, PA 17120

Dear Mr. Bailey:

I am in receipt of the letter of January 15, 1988, from your Chief Counsel, Mr. McAneny, requesting "help and advice" concerning the sale of jobs within the administration of your predecessor, Alfred P. Benedict. I have consulted with the Attorney General of Pennsylvania, the relevant agents of the Harrisburg Resident Agency of the Federal Bureau of Investigations, the Internal Revenue Service, and the Pennsylvania Bureau of Criminal Investigations and have their concurrence in making a limited disclosure to you of non-grand jury information. This information will consist of a list of names of present Auditor General Office employees on whose behalf either Al Benedict or John Kerr have stated they received a payment in exchange for employment at the Pennsylvania Auditor General office.

This list is as follows:

- |                                   |                              |
|-----------------------------------|------------------------------|
| 1. Don Ruggerio                   | 11. J. Michael Larkin        |
| 2. James C. Melo, Jr. (Promotion) | 12. Francis Favasuli         |
| 3. James M. Walsh                 | 13. Walter Speelman          |
| 4. Thomas Anderson                | 14. John E. Weikel           |
| 5. Gary Beswick                   | 15. Patrick Coyne            |
| 6. Mitchell Carr                  | 16. Frank Zatta (Promotion)  |
| 7. Beverly Esterman               | 17. Louise Jurik (Promotion) |
| 8. Markos J. Xenakis              | 18. James Discosimo          |
| 9. David Pantano                  | 19. Karol Danowitz           |
| 10. Rodney Weist                  | 20. Harold Imber             |
|                                   | 21. Lucille Russell          |



I would caution you that at least seven of these individuals have previously been named by the January 25, 1982 state-wide investigating grand jury in Presentment No. 27, which was made public on November 17, 1983. I presume that efforts to take administrative action against these particular individuals has been unsuccessful to date.

I would also point out that our evidence indicates that with the exception of Harold Imber and James Dicosimo, the actual payments delivered to Benedict and/or Kerr were made by friends, relatives (husbands, fathers, cousins), and other third parties (Michael Hanna, [deceased], Nick Saittis, etc.), rather than being made directly by the named individuals. In addition, information has been developed which identifies at least three present employees who have delivered money in order to secure jobs for others. These names cannot be made available at this time but may be made available in the near future.

You should also be aware that when names were previously released in presentments handed down by the Pennsylvania state-wide investigative grand jury, this was normally based on admissions by the named individual. This would not be the case concerning the names disclosed in this letter because they were developed through covert investigative activities by the Federal Bureau of Investigation. Accordingly, you should not presume that the named individuals have confessed any involvement to law enforcement officials. Likewise, we can express no opinion on whether these listed individuals knew of the purchase of their jobs other than the fact that our investigation affirmatively indicates that Karol Danowitz did not know of her job purchase.

I would not attempt to give you any type of legal advice concerning how to proceed with this particular information. I believe that the pitfalls you face at the administrative level have proven substantial in past cases. I would request that you keep these names strictly confidential, not use them for any type of media disclosures other than necessary to appropriate administrative proceedings, and make them available only to your most trusted employees on a need-to-know basis.

Finally, I would point out that disclosures such as are made in this letter are highly unusual when they relate to an ongoing criminal investigation, especially one involving a pattern of

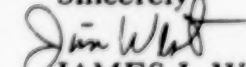
racketeering activity. In arriving at the decision to disclose this information, I have scrutinized it closely and am satisfied that it is not directly derived from grand jury material. Moreover, all parties involved have recognized the awkward position you would be placed in if the information was not made available. We have done everything possible to minimize any embarrassment to you or your office during the course of the investigation and prosecution. Hopefully, we will be able to continue in a cooperative fashion. Of course, this office can only cooperate to a certain extent and I cannot jeopardize an ongoing racketeering investigation so as to aid you in pursuing civil or administrative remedies available to you.

I have taken the liberty of enclosing a copy of the criminal RICO/tax information to which Alfred P. Benedict has entered a plea of guilty and a press release putting this material in context. I hope that last week's disclosures concerning this fourteen month covert operation explains my reaction to your remarks at your last meeting concerning the FBI's handling of corruption matters in the Middle District of Pennsylvania. My opinion remains the same, that some of the best work done anywhere in the country in the field of public corruption is being done out of the Harrisburg Resident Agencies of the Federal Bureau of Investigation and Internal Revenue Service.

I am also enclosing copies of two Federal court opinions dealing with the ethical standards applicable to the identification of unindicated co-conspirators. These standards clearly apply to this case and set the ethical tone we all should follow.

I am very pleased that after seven years of investigation someone has finally asked me for help at the Auditor General Office and I shall do everything ethically possible to provide it.

Sincerely,



JAMES J. WEST

United States Attorney

Enclosures

cc: James McAneny, Esq.  
Attorney General of Pennsylvania  
FBI (Harrisburg)  
IRS (Harrisburg)

## FBI SUMMARIES

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## U.S. Department of Justice

## Federal Bureau of Investigation

Philadelphia, Pennsylvania

July 7, 1988

**JAMES C. MELO, JR.,  
EMPLOYEE,  
PENNSYLVANIA DEPARTMENT OF THE  
AUDITOR GENERAL**

John M. Kerr, New Cumberland, Pennsylvania, was interviewed on various dates by agents of the Federal Bureau of Investigation (FBI) beginning in November, 1986.

John Kerr acknowledged and admitted that while he was the Executive Deputy to the Auditor General, a position he held from January 18, 1977, until his voluntary resignation on February 4, 1983, he was involved in the selling of jobs in the Department of the Auditor General. Al Benedict, the Auditor General of the Commonwealth of Pennsylvania from January 18, 1977, until the third Tuesday in January, 1985, was also involved in the selling of jobs with John Kerr. Kerr and Benedict personally and professionally profited from the sale of these jobs. The job selling was handled directly by John Kerr with the collaboration and cognizance of Al Benedict.

Kerr further acknowledged and admitted that while he was the Executive Deputy to the Auditor General, he was involved in the selling of job promotions and their consequent salary increases within the Department of the Auditor General. Al Benedict, the Auditor General, was also involved in the selling of job promotions and their consequent salary increases. John Kerr and Al Benedict personally and professionally profited from the sale of job promotions. The selling of job promotions was handled directly by John Kerr with the collaboration and cognizance of Al Benedict.

Kerr would take the job application to the Department of the Auditor General's personnel office and advised Russell Biggica, the Personnel Director at that time, or Eric Slater, the Assistant Personnel Director at that time, that this particular applicant

should be interviewed. Neither Russel Biggica nor Eric Slater were aware that a particular applicant had paid money to Kerr and Benedict for his job, but they did understand that the applicant should be hired by the Department of the Auditor General. The applicant was subsequently interviewed, usually by Eric Slater, and approximately four months after the receipt of the application and cash by John Kerr, the applicant was hired to a position in the Department of the Auditor General.

Through the utilization of the Department of the Auditor General's employment records from 1977 through 1985, transcripts of preliminary and other court hearings relative to John Kerr's trial in the job selling scheme and his memory, John Kerr identified individuals who purchased jobs in the Department of the Auditor General while he was the Executive Deputy to the Auditor General. Those individuals, the dates they were hired and other pertinent data are as follows:

James C. Melo, Jr., began employment in the Department of the Auditor General on October 11, 1977, as a Field Auditor I at an annual salary of \$10,367. Money was not paid to John Kerr for this job placement, but \$2,700 was paid to Kerr in late 1978 by "Reds" Barbone, a Norristown, Pennsylvania, beer distributor for a promotion for James Melo, Barbone's son-in-law. Melo was subsequently promoted from a Field Auditor I to a Field Auditor III.

Alfred P. Benedict of Mechanicsburg, Pennsylvania, former Auditor General, Commonwealth of Pennsylvania, was interviewed on various dates by agents of the FBI commencing on July 31, 1987.

From January 18, 1977, until his voluntary resignation on February 4, 1983, John Kerr served as Al Benedict's Deputy Auditor General at the Department of the Auditor General. Kerr had been very active in Benedict's political career and served as his campaign manager in his race for the Auditor General's office as well as his campaign manager in his race for the Treasurer's office in 1984.

Al Benedict acknowledged and admitted that while he was the Auditor General of the Commonwealth of Pennsylvania, a position he held from January 18, 1977, until January 21, 1985, he was aware that John Kerr was selling jobs at the Department

of the Auditor General and that he personally and professionally benefited from the sale of these jobs. Although the job selling scheme was handled by John Kerr, Benedict collaborated with Kerr and gave his consent to Kerr to carry out this illegal activity.

Al Benedict acknowledged and admitted that while he was the Auditor General of the Commonwealth of Pennsylvania, he was aware that John Kerr was selling job promotions and their consequent salary increased within the Department of the Auditor General. Benedict personally and professionally benefited from the sale of these promotions. Although the promotion selling scheme was handled by John Kerr, Benedict collaborated with Kerr and gave his consent to Kerr to carry out this illegal activity.



U.S. Department of Justice  
Federal Bureau of Investigation

Philadelphia, Pennsylvania  
July 7, 1988

**JOHN E. WEIKEL,  
EMPLOYEE,  
PENNSYLVANIA DEPARTMENT OF THE  
AUDITOR GENERAL**

John M. Kerr, New Cumberland, Pennsylvania, was interviewed on various dates by agents of the Federal Bureau of Investigation (FBI) beginning in November, 1986.

John Kerr acknowledged and admitted that while he was the Executive Deputy to the Auditor General, a position he held from January 18, 1977, until his voluntary resignation on February 4, 1983, he was involved in the selling of jobs in the Department of the Auditor General. Al Benedict, the Auditor General of the Commonwealth of Pennsylvania from January 18, 1977, until the third Tuesday in January, 1985, was also involved in the selling of jobs with John Kerr. Kerr and Benedict personally and professionally profited from the sale of these jobs. The job selling was handled directly by John Kerr with the collaboration and cognizance of Al Benedict.

Kerr further acknowledged and admitted that while he was the Executive Deputy to the Auditor General, he was involved in the selling of job promotions and their consequent salary increases within the Department of the Auditor General. Al Benedict, the Auditor General, was also involved in the selling of job promotions and their consequent salary increases. John Kerr and Al Benedict personally and professionally profited from the sale of job promotions. The selling of job promotions was handled directly by John Kerr with the collaboration and cognizance of Al Benedict.

Kerr would take the job application to the Department of the Auditor General's personnel office and advised Russell Biggica, the Personnel Director at that time, or Eric Slater, the Assistant Personnel Director at that time, that this particular

applicant should be interviewed. Neither Russell Biggica nor Eric Slater were aware that a particular applicant had paid money to Kerr and Benedict for his job, but they did understand that the applicant should be hired by the Department of the Auditor General. The applicant was subsequently interviewed, usually by Eric Slater, and approximately four months after the receipt of the application and cash by John Kerr, the applicant was hired to a position in the Department of the Auditor General.

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U.S. Department of Justice  
Federal Bureau of Investigation

Philadelphia, Pennsylvania  
July 7, 1988

**LUCILLE RUSSELL,  
EMPLOYEE,  
PENNSYLVANIA DEPARTMENT OF THE  
AUDITOR GENERAL**

John M. Kerr, New Cumberland, Pennsylvania, was interviewed on various dates by agents of the Federal Bureau of Investigation (FBI) beginning in November, 1986.

John Kerr acknowledged and admitted that while he was the Executive Deputy to the Auditor General, a position he held from January 18, 1977, until his voluntary resignation on February 4, 1983, he was involved in the selling of jobs in the Department of the Auditor General. Al Benedict, the Auditor General of the Commonwealth of Pennsylvania from January 18, 1977, until the third Tuesday in January, 1985, was also involved in the selling of jobs with John Kerr. Kerr and Benedict personally and professionally profited from the sale of these jobs. The job selling was handled directly by John Kerr with the collaboration and cognizance of Al Benedict.

Kerr further acknowledged and admitted that while he was the Executive Deputy to the Auditor General, he was involved in the selling of job promotions and their consequent salary increases within the Department of the Auditor General. Al Benedict, the Auditor General, was also involved in the selling of job promotions and their consequent salary increases. John Kerr and Al Benedict personally and professionally profited from the sale of job promotions. The selling of job promotions was handled directly by John Kerr with the collaboration and cognizance of Al Benedict.

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the Auditor General while he was the Executive Deputy to the Auditor General. Those individuals, the dates they were hired and other pertinent data are as follows:

Robert Russell, currently a Deputy to Don Bailey, the Auditor General of the Commonwealth of Pennsylvania, made a contribution of \$1,000 to Al Benedict's campaign fund. In return for this payment, Russell's wife, Lucille Russell, was given a job in the Department of the Auditor General. Lucille Russell began employment at the Department of the Auditor General on January 14, 1980.

Alfred P. Benedict of Mechanicsburg, Pennsylvania, former Auditor General, Commonwealth of Pennsylvania, was interviewed on various dates by agents of the FBI commencing on July 31, 1987.

From January 18, 1977, until his voluntary resignation on February 4, 1983, John Kerr served as Al Benedict's Deputy Auditor General at the Department of the Auditor General. Kerr had been very active in Benedict's political career and served as his campaign manager in his race for the Auditor General's office as well as his campaign manager in his race for the Treasurer's office in 1984.

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U.S. Department of Justice  
Federal Bureau of Investigation

Philadelphia, Pennsylvania  
July 7, 1988

WALTER W. SPEELMAN, JR.,  
EMPLOYEE,  
PENNSYLVANIA DEPARTMENT OF THE  
AUDITOR GENERAL

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Through the utilization of the Department of the Auditor General's employment records from 1977 through 1985, transcripts of preliminary and other court hearings relative to John Kerr's trial in the job selling scheme and his memory, John Kerr identified individuals who purchased jobs in the Department of the Auditor General while he was the Executive Deputy to the Auditor General. Those individuals, the dates they were hired and other pertinent data are as follows:

John Kerr advised that Michael Hanna, Sr., and Nick Saittis were not the only individuals who referred job aspirants to the Department of the Auditor General. Dennis J. Sabo, a Dauphin County Benedict Coordinator and an employee of the Department of the Auditor General since November, 1977, brought several people to John Kerr's attention. Sabo did not pay for his employment but did, in fact, collect money from others which money as he turned over to Kerr.

An individual who paid money to Dennis Sabo was Rachael Marte, the mother-in-law of Walter W. Speelman, Jr., who was hired on September 22, 1980, as Liquor Store Examiner I at an annual salary of \$12,968. Mrs. Marte had previously made a cash payment in the amount of \$1,500 to Dennis Sabo who, in turn, paid \$1,000 of this cash to John Kerr. Marte also made a payment for a job for John E. Weikel.

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U.S. Department of Justice  
Federal Bureau of Investigation

Philadelphia, Pennsylvania  
July 7, 1988

**DON RUGGERIO,  
EMPLOYEE,  
PENNSYLVANIA DEPARTMENT OF THE  
AUDITOR GENERAL**

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Don Ruggerio began employment with the Department of the Auditor General on February 14, 1977, as a Field Auditor I at an annual salary of \$10,367 after Richard K. Walton of Berwick, Pennsylvania, the Columbia County Democratic Chairman, gave John Kerr \$1,000 in cash at Al Benedict's inauguration in January, 1977.

Alfred P. Benedict of Mechanicsburg, Pennsylvania, former Auditor General, Commonwealth of Pennsylvania, was interviewed on various dates by agents of the FBI commencing on July 31, 1987.

From January 18, 1977, until his voluntary resignation on February 4, 1983, John Kerr served as Al Benedict's Deputy Auditor General at the Department of the Auditor General. Kerr had been very active in Benedict's political career and served as his campaign manager in his race for the Auditor General's office as well as his campaign manager in his race for the Treasurer's office in 1984.

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U.S. Department of Justice  
Federal Bureau of Investigation

Philadelphia, Pennsylvania  
July 7, 1988

**JAMES DISCOSIMO,  
EMPLOYEE,  
PENNSYLVANIA DEPARTMENT OF THE  
AUDITOR GENERAL**

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the Auditor General while he was the Executive Deputy to the Auditor General. Those individuals, the dates they were hired and other pertinent data are as follows:

Kerr advised that a source of illegal money which was received by he and Al Benedict while he was the Executive Deputy to the Auditor General came from his close personal friend Guido Alesi. Kerr initially met Alesi in 1972 while Alesi was the Huntingdon County Democratic Chairman and an employee of the Pennsylvania Department of Transportation, serving as the Supervisor of Highways in Huntingdon County. At that time, Kerr was working for the State Democratic Party. Kerr explained that Alesi was a very active fund raiser in the Huntingdon County area raising between \$9,000 and \$10,000 per year in legal campaign contributions for the State Democratic Party.

In 1976, Alesi made a \$1,000 personal contribution to Al Benedict's campaign fund and was responsible for an additional \$10,000 to \$20,000 in legal campaign contributions from Huntingdon County for the Al Benedict campaign. For his efforts, several jobs in the Department of the Auditor General were given to people who were recommended to Kerr by Alesi. In 1978, when Richard Thornburgh was elected Governor of the Commonwealth of Pennsylvania, Alesi lost his job at the Department of Transportation. He was subsequently given a job in the Department of the Auditor General as a Field Auditor III at an annual salary of \$17,174. He began his employment with the Department of the Auditor General on April 23, 1979. After Alesi began working at the Department of the Auditor General and continuing into 1980, he continued to obtain jobs within the Department of the Auditor General for individuals who made legal contributions to the general campaign fund of Al Benedict. At about this same time, however, cash payments to the campaign fund of Al Benedict began to be made to John Kerr by Guido Alesi. Kerr does not believe that a specific request was made of Guido Alesi to furnish cash payments. It was Kerr's belief that these cash payments just began to occur. Kerr never told Guido Alesi to stop making these payments in cash. Kerr did not place these cash payments into the general campaign fund of Al Benedict, but rather kept the money in his office and



co-mingled the money with other job sell cash which was then used by Kerr and Benedict as they saw fit.

Eventually, Kerr's dealings with Guido Alesi evolved into actual job and promotion selling situations. Kerr identified James Discosimo as one of these job promotion recipients. Discosimo began working for the Auditor General on January 14, 1980, as a Field Auditor III at an annual salary of \$15,863. Kerr was not sure of the amount of money Discosimo paid to Kerr and Benedict for this job, but believed the amount to be around \$1,000 in cash.

Alfred P. Benedict of Mechanicsburg, Pennsylvania, former Auditor General, Commonwealth of Pennsylvania, was interviewed on various dates by agents of the FBI commencing on July 31, 1987.

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**U.S. Department of Justice  
Federal Bureau of Investigation**

Philadelphia, Pennsylvania  
July 7, 1988

**LOUISE JURIK,  
EMPLOYEE,  
PENNSYLVANIA DEPARTMENT OF THE  
AUDITOR GENERAL**

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Kerr further acknowledged and admitted that while he was the Executive Deputy to the Auditor General, he was involved in the selling of job promotions and their consequent salary increases within the Department of the Auditor General. Al Benedict, the Auditor General, was also involved in the selling of job promotions and their consequent salary increases. John Kerr and Al Benedict personally and professionally profited from the sale of job promotions. The selling of job promotions was handled directly by John Kerr with the collaboration and cognizance of Al Benedict.

Kerr identified Mike Hanna, Sr., the Democratic Chairman of Washington County, Pennsylvania, and the former District Attorney of Washington County, Pennsylvania, (now deceased), as an active participant in the job and promotion selling scheme. Kerr first met Hanna in 1972 while Kerr was working for the

State Democratic Party. During the summer of 1976, Hanna requested and subsequently received a Legal Counsel position within the Department of the Auditor General. Hanna did not buy this job from Kerr, although he may have made a \$500 donation to Al Benedict's campaign fund. Hanna was given his job because Kerr felt that it was important to have a man of Hanna's power and influence on the Auditor General's side. Hanna did little or no work for the Department of the Auditor General and what work he did was done through his private law office in Washington County, Pennsylvania. Kerr identified Nick Saittis as being an active participant in the job and promotion selling scheme. Saittis' application for employment at the Department of the Auditor General was the first application and corresponding cash payment that Kerr received from Mike Hanna. Saittis went to work for the Department of the Auditor General on August 29, 1978.

Through the utilization of the Department of the Auditor General's employment records from 1977 through 1985, transcripts of preliminary and other court hearings relative to John Kerr's trial in the job selling scheme and his memory, John Kerr identified individuals who purchased jobs in the Department of the Auditor General while he was the Executive Deputy to the Auditor General. Those individuals, the dates they were hired and other pertinent data are as follows:

John Kerr advised that an individual who initially paid for his own job in the Department of the Auditor General and who then became involved as a broker for jobs and job promotions for other individuals was John Lignelli who currently resides at 122 Kennic Avenue, Donora, Pennsylvania. Lignelli, who began his employment in the Department of the Auditor General on March 26, 1979, worked at the Department of the Auditor General until the current Auditor General, Don Bailey, took office in 1986. Kerry speculated that Lignelli was fired by Bailey because Bailey was aware of Lignelli's previous involvement in the job sale scheme.

The fact that Lignelli was involved in the job sale scheme never came to light during Kerry's trial in 1984. During that trial, Lignelli falsely testified that he had no prior knowledge that an individual could buy a job or a promotion in the

Department of the Auditor General. Lignelli testified that he had no involvement in this job sale scheme and never paid any money directly to John Kerr. Kerr stated that Lignelli gave him numerous envelopes containing cash and employment applications for new jobs and cash for promotions for current employees. Although Lignelli never came to John Kerr's office at the Finance Building in Harrisburg, Lignelli did meet with Kerr on two occasions at the Harrisburg International Airport. On both occasions, Lignelli, utilizing Commonwealth of Pennsylvania vouchers, flew into Harrisburg from Pittsburgh and gave Kerr envelopes containing cash and job applications for individuals seeking employment with the Department of the Auditor General. Following their meetings in the airport cafeteria at the Harrisburg International Airport, Kerr returned to his office in Harrisburg and Lignelli flew back to Pittsburgh.

Kerr also met with Lignelli at the Howard Johnson Motel and Restaurant in New Stanton, Pennsylvania, and the Howard Johnson Restaurant in Monroeville, Pennsylvania, at which time envelopes containing cash and job applications were given to Kerr by Lignelli. Kerr and Lignelli also met at the Pittsburgh International Airport in the Buffetaria on two or three occasions at which time envelopes containing cash and job applications were given to Kerr. Kerr and Lignelli also met following various fund raisers that were held in the Pittsburgh area at which time envelopes containing cash and job applications were given to Kerr by Lignelli.

Kerr estimated that John Lignelli gave him envelopes containing between \$10,000 and \$20,000 in cash. Kerr believed that Lignelli was not directly responsible for obtaining jobs for individuals, but rather worked in concert with Michael Hanna, Sr. It is Kerr's belief that most of the money that Lignelli gave him originated with Michael Hanna, Sr., in Washington County, Pennsylvania.

Kerr did know that John Lignelli of Donora, Pennsylvania, was responsible for obtaining job promotions for three individuals. Lignelli gave Kerr an envelope containing \$1,000 in cash for job promotion for an individual who had previously paid for his job as an Auditor in the Police and Fire Audit Section of the Department of the Auditor General. Lignelli also gave Kerr an



envelope containing \$1,000 in cash for a job promotion for Frank Zatta, an Auditor in the Police and Fire Audit Section, and an envelope containing cash for a promotion for Louise Jurik, who was assigned to the School Audit Section of the Department of the Auditor General. The fact that these individuals paid for promotions and that Kerr received money from Lignelli for their promotions was never brought up during Kerr's trial in 1984. These individuals are still employed with the Department of the Auditor General.

Alfred P. Benedict of Mechanicsburg, Pennsylvania, former Auditor General, Commonwealth of Pennsylvania, was interviewed on various dates by agents of the FBI commencing on July 31, 1987.

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## McANENY INTERVIEW TRANSCRIPTS

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## WITNESS STATEMENT

I, James C. Melo, Jr., have been informed by Jim McAneny and Nick J. Ficco, Jr. who stated are Chief Legal Counsel and Bureau Director with the Bureau of Investigations, Auditor General's Department, Commonwealth of Pennsylvania, and that he is conducting an investigation of alleged job selling.

MCANENY: Today is Thursday, September 22, 1988, at 1:43 p.m, my name is James McAneny, I'm Chief Counsel in the Department of Auditor General, with me is Nick Ficco, Director of the Bureau of Investigations, and James Melo, who is an employe of the department. Mr. Melo, to begin with, I'd like to tell you that we are conducting an inquiry based upon certain allegations that we have received from the United States Attorney's Office regarding activities during the Benedict Administration. The nature of the allegations, and the purpose of our investigation is to conduct an administrative inquiry to determine if any disciplinary action will be called for. For other information, however, if evidence of criminal misconduct should be disclosed as a result of this investigation, we would be referring that, of course, to the appropriate authorities. Our purpose, however, is purely administrative. But because of the possible risk of criminal disclosures, you would have a right to have counsel present in this meeting, and if you wish, we can terminate the meeting at this time so that you can obtain counsel and have them be present at the time of the interview. Otherwise, if you wish to proceed at this time, you can, nevertheless, interrupt at any point, asked to have this session terminated, obtain counsel then, consult with them, and have him be present for any continuation. Do you understand that, understand what I'm saying?

MELO: Yes.

MCANENY: Do you wish to proceed at this point?

MELO: Well, can I get a more definitive explanation?

MCANENY: The allegations concern job selling during the Benedict Administration. It's about all I can tell you before going into specific questions. Anytime during the questioning

that you decide you want to stop it and obtain counsel, you have every right to do so.

MELO: Yeah, I'll answer any questions. Well, maybe I don't fully understand, so maybe that's what I ought to do.

MCANENY: You have that right.

FICCO: You have that right.

MCANENY: And we're not going to hold it against you if you want to assert that right, trust me. The information we have, if it were true, it may or may not implicate you in criminal conduct, I can tell you that.

MELO: Yeah well, that's been so long ago. You're going to ask me questions I might not, you know.

FICCO: If you don't know, or you can't answer, or you can't remember, then you just simply state that for the record.

MELO: Remember an answer. That's what I'm saying.

FICCO: No one is going to hold that against you because you didn't know or you don't remember.

MELO: Yeah, that's what I'm saying.

MCANENY: A statement cannot compel you, or we can't compel you to remember it clear and plainly.

MELO: I . . . clear and plainly over years.

MCANENY: Obviously, if you can't remember, you can't remember the answer to any specific question; but that would be your answer to it. I have no problem with that.

MELO: I understand this is tape recorded conversation?

FICCO: Yeah.

MCANENY: This is all on tape up to now.

MELO: And who is this to benefit for, who does this go to?

MCANENY: This is for the benefit of the Department of the Auditor General. If there's any criminal misconduct disclosed, as a result of it though, that we would be required to turn over to the Attorney General Office.

MELO: No, well you know, I'll answer to the best of my ability.

MCANENY: That's all you can be asked to do.

FICCO: That's all we want you to do. Please raise your right hand? Do you swear that the testimony that you are about to give here today is true and correct to the best of your ability and knowledge?

MELO: Yes.

FICCO: Would you please state your full name for the record?

MELO: James Melo.

MCANENY: Mr. Melo, do you recall when you began working for the Department of the Auditor General?

MELO: Approximately about 11 years ago.

MCANENY: At what capacity were you hired?

MELO: I worked as an auditor 1, I was in — originally hired, I was in School Audits, I didn't care for the work — I left, and from what I can remember I was with the understanding if there something else, that I could be recalled at a future time.

MCANENY: Were you, in fact, recalled?

MELO: Yes. I came back, Oh I don't know, maybe seven months later, something like that.

MCANENY: In the same capacity; a field auditor 1?

MELO: Yes, in a different bureau, County Audits, where I'm at.

MCANENY: That's where you are right now, County Audits?

MELO: Yes.

MCANENY: How long were you a field auditor 1, after you came on with the County?

MELO: A couple of years or more.

MCANENY: And at that time you received a promotion?

MELO: That was later.

MCANENY: About when, do you recall?

MELO: I was 1, a field auditor 1 for I don't know, for years or something.

MCANENY: And then you received a promotion?

MELO: Yes.

MCANENY: Do you recall to what level?

MELO: Three.

MCANENY: You were promoted from a field auditor 1 to a field auditor 3?

MELO: Yes.

MCANENY: Okay, do you recall approximately when that promotion took place?

MELO: No I don't.

MCANENY: But it would have been approximately, you said a couple years after you had come back?

MELO: After I was a one for about, I guess, about three years, maybe four.

MCANENY: Do you recall any of the circumstances surrounding your promotion?

MELO: Not really. I was a good employe, I learned all the procedures of the audit.

MCANENY: Had you requested a promotion?

MELO: That I don't remember.

MCANENY: Did anybody ever talk to you to explain why you were promoted from a one to a three, instead of from a one to a two?

MELO: I thought it was on doing good work.

MCANENY: Your bureau director, at that time, would have been Phil Dowd?

MELO: Yes.

MCANENY: Do you know if he recommended you for the promotion?

MELO: That I don't remember.

MCANENY: Do you have any information, or were you ever told by anyone that money had been paid to John Kerr to obtain your promotion?

MELO: No.

MCANENY: Were you ever called before the — or called for an interview by state authorities during the Kerr investigation?

MELO: Once, someone came to see at the job site, and the individual, I forget his capacity, had asked me some questions, I answered them, and he said to me, if we need you, we will get back in touch with you, and I never heard about it again.

MCANENY: That was back at the time when they were investigating John Kerr?

MELO: I would assume so; it's been quite a few years ago.

MCANENY: Would it have been someone from this department's Bureau of Investigations, or you just can't recall?

MELO: I just don't recall. I know the man was in some kind of official capacity or maybe it was two men. I think maybe two men.



MCANENY: Do you recall what kind of questions they asked you?

MELO: I think they explained to me what they were, the reason, and what for, but the questions I don't remember. It's been, Jesus.

MCANENY: What reason did they give you for wanting to talk to you?

MELO: What reason did they give me?

MCANENY: Yeah.

MELO: Well, they wanted to know if I knew anything about this, or pretty much what you are asking me about; if I knew anything about this Mr. Kerr fella.

FICCO: Mr. who?

MELO: Kerr, is that the name you said, yeah.

MCANENY: Kerr, John Kerr.

MELO: Right.

MCANENY: Was your father-in-law's name mentioned during that discussion?

MELO: My who?

MCANENY: Your father-in-law?

MELO: My father-in-law?

MCANENY: Yeah.

MELO: No.

MCANENY: Did your father-in-law ever discuss anything that he might have done to help you get your promotion?

MELO: No.

MCANENY: Never indicated.

MELO: My father-in-law has been dead for quite a few years.

FICCO: Who was your father-in-law, what was his name?

MELO: Roger DeBedidetto.

FICCO: Were you married — is this your only marriage, or were you married before?

MELO: Yes, no, it's my only marriage.

MCANENY: Are you related in any way to a gentleman named Barbone in Norristown?

MELO: Yes.

MCANENY: And what is that relationship?

MELO: It's my sister-in-law's husband. It's his last name.

MCANENY: Is he known by the nickname of Reds?

MELO: Yes.

MCANENY: In the questioning by whoever came to see you back around the time of the Kerr investigation, did those gentlemen ask you any questions about him?

MELO: About who?

MCANENY: Mr. Barbone.

MELO: No.

MCANENY: Has Mr. Barbone ever indicated to you that he helped you obtain a promotion in the department?

MELO: No.

MCANENY: Do you know if Mr. Barbone was a political financial supporter of Al Benedict's campaign?

MELO: Not that I know of.

MCANENY: Do you have any other questions Nick?

FICCO: I'm not quite sure I understand. It's your sister-in-law's.

MELO: Husband.

FICCO: Husband.

MELO: Yes.

FICCO: Okay. And you never knew him or..

MELO: Christ, the man is my brother-in-law through marriage.

FICCO: Through marriage, alright, I understand that. Did he ever talk to you or discuss with you?

MELO: He may have, it's been a long time, I don't remember.

FICCO: Do you know if he was ever called before the Grand Jury?

MELO: Not to my knowledge?

FICCO: Have you discussed any of this with him lately?

MELO: Discuss what with him lately?

FICCO: Job selling or..

MELO: I never thought as though I was effected in any way.

FICCO: Did you see it in the paper?

MELO: That's my only, in the newspaper, television, things of that nature.



FICCO: Did you feel that you were one of these 20, 21 that they were mentioning were still working for the auditor general?

MELO: No. As a matter of fact, are you talking about something recent?

FICCO: Yeah.

MELO: I've seen nothing in the newspapers recent. I'm thinking when everything was in the newspaper quite awhile back.

FICCO: It's possible that it could have just appeared in this area. You're from up in the Norristown area.

MELO: No I'm from Bucks County.

FICCO: Bucks County.

MELO: Approximately 25, 30 miles from Norristown.

FICCO: I have no further questions.

MCANENY: Alright, Mr. Melo, let me explain the reason we are conducting this inquiry, again, is because of information we've received from the United States Attorney, regarding various employees who are still with the department. The unfortunate aspect of that is that apparently the auditor general's opponent, in the upcoming election, has also been given some information regarding this fact, because there have been a number of press releases from here in the last few weeks demanding disclosure of the names of the 20 employees who allegedly purchased their jobs. I can assure you that it is not the intention of the department of the auditor general to release the names of the people who have been accused, but where there is no evidence that they did anything. No one needs that type of defamation; damage to their reputation. If they are only accusations.

MELO: Well, I certainly agree with you 100 percent.

MCANENY: And because of that, we are instructing everyone that comes in here that one thing that the auditor general will take seriously and will consider the most strenuous discipline, would be a violation of the confidentiality of this meeting. We don't want you discussing this matter with anyone outside this room as to the nature of the discussion, other than if you were contacted by the appropriate authority, prosecutor, or something of that nature, or you can discuss it with your own

legal counsel. But other than that, we don't want this information leaked out, don't want to have to read anybody's names in the newspaper as these people are being investigating for buying jobs ten years ago, or whatever, and it really boils down to that rule of confidentiality will be as strictly enforced as we can. I want you to understand that that is, it is absolute.

MELO: I entirely agree with you.

MCANENY: So as long as you understand that, I think we're finished here, we can go off the record again.

— END OF STATEMENT —

### AFFIDAVIT

I, \_\_\_\_\_  
(have had read to me) (have read) this statement which begins on page (1) and ends on page 9. I fully understand the contents of the entire statement made by me. This statement is true. I have initialed all corrections and have initialed the bottom of each page containing statement matter. This statement has been made by me freely without hope of benefit or reward, without threat of punishment, and without coercion, freely without hope of benefit unlawful influence, or reward, without threat of punishment, or unlawful inducement.

\_\_\_\_\_  
(Signature of Person Making Statement)

SWORN TO AND SUBSCRIBED BEFORE ME THIS  
22nd day of September 1988, AT Harrisburg, PA.

\_\_\_\_\_  
Special Agent  
Bureau of Investigations  
Department of the Auditor General

This oath is administered by virtue of the authority vested in me by Don Bailey, Auditor General, pursuant to the provisions of Section 517 of the Act of April 9, 1929, P. L. 177, as amended.

## WITNESS STATEMENT

I, John Weikel, have been informed by Jim McAneny and Nick J. Ficco. Jr. who stated are Chief Counsel and Bureau Director with the Bureau of Investigations, Auditor General's Department, Commonwealth of Pennsylvania, and that he is conducting an investigation of alleged job selling.

MCANENY: Today is Thursday, October the 6th, the time is 2:49 p.m. My name is James McAneny, I'm Chief Counsel in the Department of the Auditor General, with me is Nick Ficco, Director of our Bureau of Investigations, and John Weikel, an employee in the department. John, so I can explain to you the reason we've asked you to come in. You may be aware from press accounts, but the department has received certain allegations from the United States Attorney's Office regarding alleged misconduct during the Benedict administration, and we are conducting an internal investigation to determine whether or not any form of disciplinary, or other administrative action would be warranted, as a result of those allegations. The purpose of our review is simply that, civil; just to decide whether or not we can show just cause to enforce any kind of discipline. However, because of the nature of the allegations, it is possible that evidence of criminal misconduct could be disclosed in our investigation, in which case would turn that information over to the attorney general and to the U.S. Attorney. Because of that possible risk, you're advised that you would have a right to have counsel present with you during this interview, and if you so desire, we'll stop now until you have a chance to get a lawyer to come in with you. If you prefer, we can proceed at this time, but if at any point the questioning becomes such that you wish to stop the interview, we will do that. We won't be prejudice by it, and you'll have an opportunity to get a lawyer to come in at a later time. Do you understand that?

WEIKEL: Yeah.

MCANENY: Could you do me the favor and speak up for the microphone. As you can see, we're on tape and rather than have somebody sit in here and take shorthand, we're using the tape recording, as a method of recording the interview. Nick would you?

FICCO: You're willing to talk to us then?

WEIKEL: Yes I am.

FICCO: Please raise your right hand John. Do you swear that the testimony you're about to give is true and correct to the best of your knowledge and belief?

WEIKEL: I do.

FICCO: Please state your full name for the record?

WEIKEL: John Earl Weikel.

MCANENY: John, I'm sure that this is not a matter which is new to you. My information indicates you've been through this a number of times in the past, and I don't really have anything new to offer. Let's start when you were employed by the Department of the Auditor General. Do you recall when that was?

WEIKEL: I was hired October '83, I believe it was.

MCANENY: What do you recall about the circumstances surrounding your obtaining that employment?

WEIKEL: All I know is, I got an application from my mother-in-law, I filled it out, and gave it back to her, and that's it.

MCANENY: Okay, what was your mother-in-law's name?

WEIKEL: Rachel Marty.

MCANENY: After that, were you, at any time, called by the attorney general, or the state grand jury to testify?

WEIKEL: Yeah and got a subpoena from the Attorney General's Office.

MCANENY: Okay, that would have been, how long after you came to work?

WEIKEL: It would have been about the middle of November, the same year.

MCANENY: The following month?

WEIKEL: Yeah.

MCANENY: Did you go in to speak with them in an interview first, or were you called directly before the Grand Jury?

WEIKEL: No, they came up to our house, gave us a subpoena, then we went down, well I wasn't there, so I had to leave work here and go down and pick it up down there in Strawberry Square.



MCANENY: Okay. Were you asked about how you obtained your employment with the department?

WEIKEL: Yes I was.

MCANENY: Were you asked if you had purchased your job with the department?

WEIKEL: Yes I was.

MCANENY: And did you purchase your job with the department?

WEIKEL: No I didn't.

MCANENY: Do you have any information as to whether any other person made a payment to obtain your employment with the department?

WEIKEL: Last year the agents came up, I found out my mother-in-law donated some money, and that's all I know.

MCANENY: Your mother was, your mother-in-law, rather, was also subpoenaed?

WEIKEL: Yes.

MCANENY: Before the Grand Jury, was she not?

WEIKEL: Yes she was.

MCANENY: Alright, were you ever told that she was granted immunity from prosecution for her testimony?

WEIKEL: No.

MCANENY: Were you ever offered immunity from prosecution in return for testimony against John Kerr?

WEIKEL: Yes.

MCANENY: Did you accept that grant of immunity?

WEIKEL: Yeah.

MCANENY: Did you accept that grant of immunity?

WEIKEL: Yeah.

MCANENY: Did you testify against Mr. Kerr?

WEIKEL: No, they didn't — I mean, when they subpoenaed us and told us we had immunity and everything, but I didn't know nothing to tell them so I couldn't. They never called me into court or anything.

MCANENY: Were you ever suspended from your employment with the department pending an investigation into this matter?

WEIKEL: No, I was fired.

MCANENY: You were fired? when did this happen?

WEIKEL: Let's see, October — they fired me about the middle of November, and then they called me back near the end of December.

MCANENY: Were you interviewed by investigators from this department, during that period between your firing and when you were called back?

WEIKEL: I can't really remember, to tell you the truth. I don't know if I talked to anybody in here or not. It may have been, I couldn't really tell you.

MCANENY: Do you know if anyone talked with Rachel Marty, during that period?

WEIKEL: No I don't.

MCANENY: Have you ever been questioned regarding this matter other than by the Attorney General's Office and possibly someone from this department?

WEIKEL: No.

MCANENY: You have not been called by the United States Attorney, or the FBI?

WEIKEL: No.

MCANENY: You've not been contacted by the Attorney General's Office since that time?

WEIKEL: No.

MCANENY: Do you have anything Nick?

FICCO: What type of donation, John, did Mrs. Marty place?

WEIKEL: \$1,500.

FICCO: \$1,500. Who did she give that to?

WEIKEL: From what I understand, a Denny Zabo.

FICCO: When did she relate this to you that she gave it to him?

WEIKEL: I only found out after we got the subpoena from the attorney general.

FICCO: Were you ever given any money?

WEIKEL: What do you mean?

FICCO: Did you ever give any money to the auditor general, at that time? Did you ever give any money to John Kerr?

WEIKEL: No.



MCANENY: John, what was your employment status at the time you got the job with this department?

WEIKEL: I was unemployed.

MCANENY: How long had you been unemployed?

WEIKEL: About 2-1/2 years.

MCANENY: When you say that you had, you found out that your mother-in-law had made a \$1,500 contribution after you were served with a subpoena; how did you find that out?

WEIKEL: Well, through going through court and that, and she told us after she gave us a subpoena and that.

MCANENY: Oh, she told you.

WEIKEL: Yeah.

MCANENY: Did she ever tell you that there was a relationship between that and obtaining your job?

WEIKEL: No, she just said that she made a donation.

FICCO: Did she ever say if anyone asked her to make the donation, or she do it on her own?

WEIKEL: No, she didn't tell me.

MCANENY: I have no other questions, do you Nick?

FICCO: No.

MCANENY: Alright John, nothing new under the sun, it appears. I want you to be aware that the auditor general is conducting this investigation because of the information we've received from the attorney general's office. The information, apparently, is nothing different than what was previously investigated by the attorney general back in the early '80s; but we are nevertheless proceeding, as required, to determine if disciplinary action can be justified. Mr. Bailey's opponent, however, in this political campaign, has made a political issue of demands for disclosure of the names of the people that were transmitted to us from the U.S. Attorney's Office. The auditor general has no intention of disclosing any names of people who have been accused of doing something where there is no evidence that would indicate that they did anything wrong. That is to protect you and the other people who have been accused, but who are innocent, rather than to protect the auditor general, who would probably be politically benefited by just disclosing the names, or firing everybody, and being done with it; but it's not something that we can justify. Where there's no knowledge on the part of

an individual that a payment may or may not have been made to obtain their job. Additionally to protect everyone involved, or everyone named by the U.S. Attorney, we're instructing each person that comes in, that this interview has to be maintained in the strictest confidence. We don't want you discussing it with co-workers or anyone else. You can discuss it with private legal counsel, if you wish; and certainly, if you're ever contacted again by the attorney general, or the U.S. Attorney, or someone like that, and they ask you about it, you tell them the truth. Other than that, please don't discuss this outside of this room. To the extent possible, the strongest disciplinary action will be taken against anyone who breeches the confidentiality of these meetings, because it just increases the likelihood that innocent people are going to be defamed by having their names connected with accusations that can't be proven. Do you understand that?

WEIKEL: Uhum.

MCANENY: Do you agree to keep this meeting confidential?

WEIKEL: Yeah.

MCANENY: Do you have anything else you want to add, or questions?

WEIKEL: No.

MCANENY: Okay.

— END OF STATEMENT —

### AFFIDAVIT

I, \_\_\_\_\_  
(have had read to me) (have read) this statement which begins on page (1) and ends on page 7. I fully understand the contents of the entire statement made by me. This statement is true. I have initialed all corrections and have initialed the bottom of each page containing statement matter. This statement has been made by me freely without hope of benefit or reward, without threat of punishment, and without coercion, unlawful influence, or unlawful inducement.

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(Signature of Person Making Statement)

SWORN TO AND SUBSCRIBED BEFORE ME THIS 6th  
day of October 1988, AT Harrisburg, PA.

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Special Agent  
Bureau of Investigations  
Department of the Auditor General

This oath is administered by virtue of the authority vested in me by Don Bailey, Auditor General, pursuant to the provisions of Section 517 of the Act of April 9, 1929, P. L. 177, as amended.

### WITNESS STATEMENT

I, Lucille Russell, have been informed by Jim McAneny and Nick J. Ficco. Jr. who stated are Chief Legal Counsel & Bureau Director with the Bureau of Investigations, Auditor General's Department, Commonwealth of Pennsylvania, and that he is conducting an investigation of alleged job selling.

MCANENY: Today is Tuesday, September 20th, the time is 1:21 p.m., my name is James McAneny, I'm Chief Counsel in the Department of the Auditor General, with me is Nick Ficco, the director of our Bureau of Investigations, and Lucille Russell, a field auditor in the Bureau of School Audits. Lucille, let me give you a little background on what we are doing here. Our department has been given information, rather abbreviation information, alleging certain misconduct among employees of this department during the Benedict Administration. We are obligated to conduct an inquiry to determine if there exist grounds for any administrative action within the department, such as a disciplinary action. That is the nature and purpose of this investigation. I should caution you that should information be obtained as a result of this investigation, which would indicate that there was criminal misconduct, we would be obligated to turn that information over to the appropriate authorities. Because of that potential risk, you are advised that you have a right to consult with legal counsel, or to have legal counsel present during this interview, and you can at this time refuse to proceed until you have a chance to obtain counsel, or we can proceed but if at any point during the questioning you feel that you wish to consult with counsel, all you have to do is say so, we'll terminate the proceeding at that point, and you will be free to go until we can arrange for you to come back in with your lawyer. Do you understand that?

LRUSSELL: Yes.

MCANENY: Okay. Do you wish to proceed at this point?

LRUSSELL: Yeah.

MCANENY: Alright thank you very much. Nick would you administer the oath please?

FICCO: Would you please raise your right hand? Do you swear that the testimony you are about to give here today is true and correct to the best of your ability and knowledge?

LRUSSELL: Yes I do.

FICCO: She's sworn.

MCANENY: Lucille, I'm going to keep this as brief as possible. What do you recall of the circumstances surrounding your original employment with the Department of the Auditor General? How did you get the job, do you know?

LRUSSELL: I filled out an application, I applied for it, came down for an interview.

MCANENY: At that time, you weren't married to Mr. Russell at that point in time, or were you?

LRUSSELL: I'm not sure when I originally filled out my application, to tell you the truth, it may have. I got married in May of '79, and I was hired in January of 1980; but my application may have been filled out. That time in there is lost. I have no idea, really.

MCANENY: Do you know if Bob had anything to do with your obtaining the job?

LRUSSELL: Meaning?

MCANENY: Did he recommend you for the job?

LRUSSELL: Yes.

MCANENY: He has already told us that he did speak with John Kerr about obtaining a job for you, okay.

LRUSSELL: Yes.

MCANENY: Other than — did he discuss that fact with you?

LRUSSELL: That he would talk to John?

MCANENY: Yes.

LRUSSELL: Yes.

MCANENY: Do you recall making any political contributions to the Benedict campaign?

LRUSSELL: Yes.

MCANENY: Can you tell what those were, what contributions they were?

LRUSSELL: If I would have known what this was all about today, I could have brought you all our canceled checks, for all our political contributions.

MCANENY: I understand that.

LRUSSELL: Okay, I remember the one, which Bob was called to testify, the one that was \$1,000 check.

MCANENY: When you say he was called to testify, that was his appearance before the Grand Jury when they were investigating John Kerr?

LRUSSELL: Yeah.

MCANENY: And that \$1,000 check, do you recall when that contribution was made, roughly?

LRUSSELL: No.

MCANENY: Was it before you were employed by the department or after?

LRUSSELL: I can honestly sit here and say I don't remember. I have the canceled check, if I can look. But I really do not remember.

MCANENY: Another question, and this is the tough one. Was that contribution made in consideration for your obtaining the job?

LRUSSELL: No. You said to answer to the best of my knowledge, that's to the best of my knowledge. The check was not made as payment for a job, which is . . . Any of our contributions made anytime during the years was never a payment for a job, and we've considered to support the people we work for. That's just the way we believe.

MCANENY: I understand that. Nick, do you have anything?

FICCO: During the time of the \$1,000, how many, how much money did you give beyond that?

MCANENY: To the Benedict campaign, or to others?

FICCO: To others, to the Benedict campaign.

LRUSSELL: From then to now?

FICCO: When you say to others, are you talking John Kerr, or are you talking . . .

LRUSSELL: No, no, no, I'm speaking of candidates.

FICCO: No, within the Benedict . . .

LRUSSELL: Well, I'm sure we made other contributions to the Benedict campaign, but the checks were made out to the Benedict campaign. We never paid anything in cash.

FICCO: It was all checks?



LRUSSELL: All checks; never made a cash donation. I know that for a fact.

FICCO: I assumed you did.

LRUSSELL: Yes I do. I don't pay cash for anything, no. And we've made contributions since then to other candidates, it's just the way know it.

MCANENY: Lucille?

LRUSSELL: Yes.

MCANENY: Have you been questioned by anyone else regarding this matter?

LRUSSELL: Years ago, during the Grand Jury investigation.

MCANENY: Did you appear before the Grand Jury?

LRUSSELL: No I did not, it was internal. It may have been the bureau.

MCANENY: Oh internal would have been this department.

LRUSSELL: Yes. I do believe it would have been within this department, or it may have been the attorney general also.

FICCO: Do you remember who within the department may have interviewed you?

LRUSSELL: No I don't. It was in Monroeville, we had a seminar, and they asked if they could meet with me for awhile, but I don't remember.

MCANENY: It may have been Justice Department, may have been someone from the Attorney General's Office.

LRUSSELL: It may have been.

MCANENY: You answered them basically the way you've answered us?

LRUSSELL: Yes.

MCANENY: Alright, the last thing that I have to go through is my warning. Don Bailey has instructed us to make certain that everyone that is brought in in this investigation is told that they are not to discuss this outside of the room. Not to discuss either their testimony, or the fact that we are investigating these matters, or who else appeared here. The primary reason for that is to assure that those persons who may have been accused, but who are not found to have committed any wrong doing, are not damaged in their reputation, or any other

way by disclosure of the fact that they've been accused. Now, I can assure you that any disclosure outside of this room, other than with an attorney, you are always entitled to consult an attorney, and actually in your particular case with the spousal relationship, you would also be permitted to discuss it with your husband. There is no way that can be barred. That is privileged communication as well. But, outside of that, there can be no disclosure of this. That will be dealt with severely by the department. I mean, we're not going to look lightly upon this kind of thing being leaked out. I don't want to see Bob Russell or Lucille Russell, or anybody else being listed in the newspaper as one of the 20 people that they have been talking about, that the press has been talking about, okay. Do you understand what I mean?

LRUSSELL: I understand.

MCANENY: Okay. Do you have anything else you want to add, or do you have any questions?

LRUSSELL: No.

— END OF STATEMENT —

#### AFFIDAVIT

I, \_\_\_\_\_  
(have had read to me) (have read) this statement which begins on page (1) and ends on page 6. I fully understand the contents of the entire statement made by me. This statement is true. I have initialed all corrections and have initialed the bottom of each page containing statement matter. This statement has been made by me without coercion, freely without hope of benefit unlawful influence, or reward, without threat of punishment, or unlawful inducement.

\_\_\_\_\_  
(Signature of Person Making Statement)

SWORN TO AND SUBSCRIBED BEFORE ME THIS  
20th day of September 1988, AT Harrisburg, PA.

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Special Agent  
Bureau of Investigations  
Department of the Auditor General

This oath is administered by virtue of the authority vested in me by Don Bailey, Auditor General, pursuant to the provisions of Section 517 of the Act of April 9, 1929, P. L. 177, as amended.

### WITNESS STATEMENT

I, Walter W. Speelman, have been informed by Jim McAneny and Nick J. Ficco, Jr. who stated are Chief Legal Counsel and Bureau Director with the Bureau of Investigations, Auditor General's Department, Commonwealth of Pennsylvania, and that he is conducting an investigation of alleged job selling.

MCANENY: Today is September 22, 1988, the time is 1:30 p.m., my name is James McAneny, I'm Chief Counsel in the Department of the Auditor General, with me is Nick Ficco, Director of the Bureau of Investigations, and Walter Speelman, who is a Liquor Store Examiner with the department. Mr. Speelman, I wish to tell you why we brought you in here today. We are conducting an inquiry, as a result of certain information which was provided to the department by federal authorities. The specific information constitutes allegations of wrongdoing while Auditor General Al Benedict was in office. The nature of our inquiry is administrative only. We are trying to determine if any disciplinary action is warranted or justified as a result of the allegations; but, for your information, if our inquiry discloses criminal misconduct, we would be turning that information over to the appropriate authorities, criminal authorities. Because of that potential, you do have a right to have counsel present with you during questioning, and you can ask us to suspend this interview at this time, and have counsel be present at a later date when we can schedule it. Otherwise, we can proceed at this point, but if at anytime during the questioning you wish to do so, you can ask to have the matter terminated at that point, so that you can consult with counsel and him present for continuation. Do you understand that?

SPEELMAN: Yes.

MCANENY: Do you wish to proceed now?

SPEELMAN: Yes.

MCANENY: Thank you. I appreciate that.

FICCO: Would you please raise your right hand? Do you swear that the testimony you are about to give here today is true and correct, to the best of your knowledge and ability?

SPEELMAN: Yes I do. Yes I do.

FICCO: Would you please state your full name for the record?

SPEELMAN: Walter William Speelman, Jr.

MCANENY: Mr. Speelman, do you recall when you started employment with the Department of the Auditor General?

SPEELMAN: September 22, 1980.

MCANENY: Do you have any information or are you aware of the circumstances by which you obtained your employment?

SPEELMAN: All I did is filled out the application, filled out an application and was hired.

MCANENY: This is old information, there's no point in my trying to beat around the bush with this thing. We have compared the allegations recently received with the information that was disclosed when John Kerr was investigated and prosecuted, and I'm going to tell you basically what the allegation is; that you're mother-in-law, Rachel Marty, gave money to Dennis Savo. Specifically that she gave him \$1,500, and that he then turned over \$1,000 of that to John Kerr to obtain the job. Now, were you questioned about this matter, during the Kerr investigation?

SPEELMAN: I was asked if I was aware of anything like that, which I wasn't.

MCANENY: I understand that. I have seen a sworn statement from your mother-in-law saying that you were not aware of anything. Were you questioned by the Attorney General's Office?

SPEELMAN: Yes I was.

MCANENY: Were you called before the Grand Jury that investigated John Kerr?

SPEELMAN: Yes I was.

MCANENY: Have you ever been questioned by any other prosecuting authorities regarding this matter?

SPEELMAN: Just — not prosecuting authorities, no. Just the previous administration's Investigations.

MCANENY: The Bureau of Investigations under Al Benedict.

SPEELMAN: Yes.

MCANENY: Do you know if your mother-in-law testified before the Grand Jury?

SPEELMAN: Yes she did.

MCANENY: Do you know if she received a grant of immunity in return for her testimony?

SPEELMAN: I believe she did; I'm not positive.

MCANENY: Well, for the record, the testimony that I have seen would indicate that she was granted a grant of immunity as was Dennis Savo, in return for their testimony against John Kerr. I would also point out for the record that all the evidence indicates that you were not aware of any monies paid on your behalf to obtain your job.

SPEELMAN: No I wasn't.

MCANENY: And you're reaffirming that fact today?

SPEELMAN: Yes I am.

MCANENY: Nick do you have any other questions?

FICCO: No I don't.

MCANENY: Okay, Mr. Speelman, do you have anything to add of your own?

SPEELMAN: Not that I can think of, nothing that probably isn't in front of you there.

MCANENY: Okay. I apologize for having to really drag you back in for what is basically a rehash of old information; but if you read the papers, I would imagine you've noted recent articles regarding approximately 20 employees of this department who allegedly purchased their jobs under the Benedict Administration and are still on the payroll. As a result of the information that the U.S. Attorney's Office did provide to us, we are conducting an inquiry. Unfortunately, a lot of it is this kind of thing. It's old information that was previously resolved, and why it's turning up again is quite beyond me. I mean, I have no idea how they would expect an arbitrator to allow us to discipline an employee for something that he didn't do, and in fact had no knowledge of. But, they sent it to us and we are conducting our inquiry. To protect those people who have been accused, but who have done nothing wrong, the auditor general has instructed us to tell everyone who comes in, under no circumstances are they to release any information about this interview,



of any kind, to any person other than an appropriate investigating agency, U.S. attorney, or the attorney general, or the FBI, or the State Police, or somebody want to talk to you about it, obviously, tell them, tell them what we discussed here.

SPEELMAN: Yes.

MCANENY: Or if you wish to discuss it with your own private legal counsel, go ahead. Beyond that, we want absolutely no disclosures.

SPEELMAN: Would you like to be notified if I was asked by any of those authorities?

MCANENY: That's, to an extent, your prerogative. Although, I would call your attention to the employee code of conduct, which would indicate that if any employee is called as a material witness, or as a defendant in a criminal prosecution, they are to notify their employer.

SPEELMAN: Okay.

MCANENY: But primarily, I am just concerned that we do not drag anyone's name through the mud for no reason. I mean, I'm sure you're aware of the fact that simply being accused can lead to an awful lot of doubt in people's minds, and I'm sure you are equally aware it's probably the most difficult thing in the world to do, is to prove a negative. Obviously there was no case that could be proven against you, or you would have been included in the Kerr trial; but it is equally impossible for you to actually prove your innocence. So we would prefer that people not be aware of the accusation, and I'm sure that you would prefer that as well, as would other innocent persons that have to be interviewed as a result of this inquiry. Your cooperation is not only requested, but I can assure you that the one thing that would lead to the most severe disciplinary action that the auditor general could use would be disclosure of this information. Other than as I told you to a proper authority. Do you understand all that?

SPEELMAN: Yes I do.

MCANENY: Do you agree to it?

SPEELMAN: I have one question.

MCANENY: Sure.

SPEELMAN: I might be way off base asking this. You had said that this was all past things that you thought were resolved, am I going to be suspended again while this investigation is going on?

MCANENY: No sir.

SPEELMAN: Okay.

MCANENY: If that would have been our intention, you would have been suspended pending the investigation.

SPEELMAN: I just wanted to make sure.

FICCO: Were you suspended the last time Walter?

SPEELMAN: Yes I was.

MCANENY: Yes he was.

SPEELMAN: I was suspended for approximately 46 days.

MCANENY: In fact, everyone that was named, or otherwise identified in the indictment papers from Kerr's trial was suspended on the day that the indictment was handed down, and it stayed that way until they could determine what was going on. But no, we are not proceeding with it. As I said, there is nothing new in these allegations that would indicated that there was any reason to suspend you. If it had been something totally new and different, we might have handled it differently, but I just, I mean the records are here in the department, the records are clear, the records are in the Attorney General's Office. If there was some basis for a suspension, you would have been suspended. At this point, no.

SPEELMAN: Okay, thank you.

MCANENY: A suspension pending an investigation with this, it's obviously, the investigation was conducted seven years ago; not much point in redoing it now. Okay, thank you.

SPEELMAN: Thanks.

— END OF STATEMENT —

#### AFFIDAVIT

I, \_\_\_\_\_  
(have had read to me) (have read) this statement which begins on page (1) and ends on page 6. I fully understand the contents of the entire statement made by me. This statement is true. I have initialed all corrections and have initialed the bottom of each

page containing statement matter. This statement has been made by me freely without hope of benefit or reward, without threat of punishment, and without coercion, unlawful influence, or unlawful inducement.

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(Signature of Person Making Statement)

SWORN TO AND SUBSCRIBED BEFORE ME THIS  
22nd day of September 1988, AT Harrisburg, PA.

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Special Agent  
Bureau of Investigations  
Department of the Auditor General

This oath is administered by virtue of the authority vested in me by Don Bailey, Auditor General, pursuant to the provisions of Section 517 of the Act of April 9, 1929, P. L. 177, as amended.

### WITNESS STATEMENT

I, Donald Ruggerio, have been informed by Jim McAneny and Nick J. Ficco, Jr. who stated are Chief Counsel and Bureau Director with the Bureau of Investigations, Auditor General's Department, Commonwealth of Pennsylvania, and that he is conducting an investigation of alleged job selling.

MCANENY: Today is Thursday, October the 6th, the time is 1:36 p.m. My name is James McAneny, I'm Chief Counsel in the Department of the Auditor General, with me is Nick Ficco, Director of the Bureau of Investigations, and Donald Ruggerio, an employee of the department, who I might add for the record is currently out on workmen's compensation but agreed to come in voluntarily for the purposes of this interview. Mr. Ruggerio, so that you understand why we asked you to come in, the auditor general has received certain information from the United States Attorney's Office concerning alleged misconduct during the Benedict administration. In specific, we're going back to the job selling scandal stuff. The purpose of our investigation is not criminal in nature. It is to determine whether or not sufficient evidence exists to warrant any form of disciplinary action at this time for the actions alleged to have occurred in the past. The nature of our examination, although just administrative, could, however, disclose evidence of criminal misconduct, which if we should discover, we will turn over to the appropriate authorities. Because of that possible risk, you would have a right to have counsel present at this meeting, if you so desire, or if you wish, we could proceed with the interview, but at any point you decide that you want to stop it because you want to consult with counsel, we'll terminate at that point, and give you a chance to get a lawyer and come back in at a later date. Do you understand this?

RUGGERIO: Sure.

MCANENY: Do you want to proceed now?

RUGGERIO: Sure.

MCANENY: Okay.

FICCO: Please raise your right hand. Do you swear that the testimony you are about to give here is true and correct to the best of your knowledge and belief?



RUGGERIO: I do.

FICCO: Please state your full name.

RUGGERIO: My name is Donald D. Ruggerio.

MCANENY: Okay, Mr. Ruggerio, when did you first start working for the Department of the Auditor General?

RUGGERIO: February 14, 1977.

MCANENY: Was that during Mr. Benedict's first term?

RUGGERIO: Yes.

MCANENY: What do you recall of the circumstances surrounding your original employment?

RUGGERIO: I was laid-off from PennDOT for almost a year, and I ran into, I belong to Unical; which is an Italian service organization, and I've done a lot of charity work with the Scranton District; and I happened to be up there for dinner. It must have been back in October of '76, and Mr. Benedict and Mr. Biggica was up there, and I approached them, and I said, "I was looking for employment." And he said, "Well, come down and get an application, fill it out, and we'll see what happens." I told him I was laid-off from PennDOT, at that time; Montoursville Office.

MCANENY: Okay then, so you filled out an application and what happened after that?

RUGGERIO: I didn't hear anything for about six weeks, and then I think after the first of the year, after maybe the 20th, January 20th, somebody gave me a ring and said come on down for an interview.

MCANENY: So you came down for an interview?

RUGGERIO: Yes.

MCANENY: Who did you interview with? Do you recall?

RUGGERIO: I think it was the Personnel Director.

MCANENY: Who would it have been, Mr. Biggica?

RUGGERIO: No, no, he had a man under him that interviewed me, I think. It's a long time ago, it's over, almost 12 years ago.

MCANENY: Yeah it has been awhile.

RUGGERIO: It was a — it was a gentleman underneath that I think interviewed me, not Mr. Biggica.

MCANENY: Would it have been Eric Slater?

RUGGERIO: I think that was the person, yes. I'm not positive, but I think that's who.

MCANENY: After your interview, what happened then?

RUGGERIO: Well then they said they would let me know, and I guess they called or sent me a letter in the mail to report.

MCANENY: Was there a substantial lapse of time between the interview and the letter saying you were hired, or was it just a couple weeks?

RUGGERIO: It had to be between January 20, and right after the inauguration then, and February 14th.

MCANENY: Had you been an active supporter of Mr. Benedict in his campaign?

RUGGERIO: No, I didn't meet Mr. Benedict until like, like I told you, October of '76, at this Unical with, I'm trying to think of some people that were there. It was National President Al Donte invited me up. You know, it was one of those interchange. You go to another chapter. I knew nothing about the Auditor General's Department up to that time.

MCANENY: What county were you from?

RUGGERIO: Columbia.

MCANENY: Columbia.

RUGGERIO: Uhum.

MCANENY: Did you know Richard Walton?

RUGGERIO: Dick Walton was the county chairman, I think, at that time. I think he signed my application.

MCANENY: Did you talk to him about signing your application?

RUGGERIO: Well, that's after I talked to Mr. Benedict and Mr. Biggica up at the Unical. I come back and told Mr. Walton that they were interested in me and that I was supposed to submit an application; if he would sign the application for me.

MCANENY: What did Mr. Walton do for a living, do you know?

RUGGERIO: Mr. Walton works here.

MCANENY: He works here, he's with the department?

RUGGERIO: He's a supervisor, yes.

MCANENY: And did Mr. Walton discuss any financial contributions with you?

RUGGERIO: No.



MCANENY: Did Mr. Benedict, or Mr. Biggica, or anyone else suggest that you should make a contribution to Mr. Benedict's campaign?

RUGGERIO: No.

MCANENY: Did you ever deliver any money to Mr. Walton for any reason?

RUGGERIO: We sold tickets for a fund raiser.

MCANENY: When was that?

RUGGERIO: Here you go, you're going way back again. It had to be 1980. It must have been 1980 we sold them. I think we had a party for him.

MCANENY: That was up . . .

RUGGERIO: Yeah at the . . .

MCANENY: Up in Columbia County?

RUGGERIO: Yeah.?

MCANENY: Did Mr. Walton handle the organization of the affair?

RUGGERIO: Yeah, I would say yeah.

MCANENY: Alright, he's the one that you returned your ticket stubs and money to?

RUGGERIO: Money to, right.

MCANENY: Did you ever make a \$1,000 contribution to Mr. Benedict's campaign?

RUGGERIO: Never. I belonged to, I think in '82, I belonged to the Century Club; not Century Club, what did they call it, 500 Club.

MCANENY: 500 Club.

RUGGERIO: Yeah, and that was on a voluntary basis I gave that. I give a lot of money to my political party, not only to Mr. Benedict, or any other.

MCANENY: Did you make a contribution to Mr. Benedict's inauguration, back in 1977?

RUGGERIO: No.

MCANENY: Have you ever been questioned about these matters before, by any authority?

RUGGERIO: No, no.

MCANENY: Not by the Attorney General's Office?

RUGGERIO: Oh wait a minute. Somebody stopped, after the accident, I think somebody stopped at the hospital. Two

guys double-teamed me, and I told him I didn't know anything about it. I then exactly what I'm telling you.

MCANENY: This is in the hospital?

RUGGERIO: Yes . . .

MCANENY: When was this?

RUGGERIO: In fact I'll tell you the two gentlemen, they were from Scranton. I don't know, his brother was an attorney up there. I just can't think of his name right now. It was him and his supervisor.

MCANENY: What agency did they belong to?

RUGGERIO: Attorney General, that's what you said.

MCANENY: Attorney General's Office?

RUGGERIO: Yeah, yeah.

MCANENY: Was this back when they were first investigating John Kerr before he was indicted?

RUGGERIO: I think, yeah.

MCANENY: When was your accident?

RUGGERIO: '83.

MCANENY: '83, and John was indicted in November of '83. So it would be earlier in the year?

RUGGERIO: It had to be.

MCANENY: Okay. Well, you'd know when your accident was, and you'd know when you were in the hospital.

RUGGERIO: Yeah, no, it was November 16th of 1983, when I had my accident.

MCANENY: November 16, 1983.

RUGGERIO: 1983, yeah.

MCANENY: And two gentlemen from the Attorney General's Office came in to talk to you?

RUGGERIO: That's right. It must have been either '83, or '84; but I was in the hospital in '83 though, so it was '83.

MCANENY: Do you recall what they asked you about?

RUGGERIO: About the same line of questioning you're talking about; about giving — paying for a job, and stuff like that, and I said, no way.

MCANENY: Have you ever been questioned by anyone else?

RUGGERIO: No.

MCANENY: Since then?

RUGGERIO: No.

MCANENY: No one from the Department of the Auditor General's Investigation bureau back around that same time?

RUGGERIO: Never.

MCANENY: No one from the U.S. Attorney's Office?

RUGGERIO: Never.

MCANENY: Or the FBI?

RUGGERIO: Never. The FBI called me once on a job reference for some young man. I worked . . .

MCANENY: Alright, totally unrelated to this; they didn't ask you any questions about this?

RUGGERIO: No, see I used to work for the government before; Federal Government.

MCANENY: What was your position?

RUGGERIO: I was with the CIA at the time. I was a security officer for the CIA.

MCANENY: Okay, I have no other questions. Do you have anything Nick?

FICCO: Yes. From 1977 when you were hired?

RUGGERIO: Uhum.

FICCO: Until 1980, when you related to the fund raiser you worked, or participated in, in three years?

RUGGERIO: The had had, they had so many parties Nick, I can't remember which ones that I was involved. It must have been a couple, it had to be a couple parties. You know what I mean?

FICCO: Uhum.

RUGGERIO: Over the years, it's just it's hard to remember. I've been to so many darn parties.

FICCO: Yeah. Why does 1980 stick out in your mind?

RUGGERIO: I don't know why, I just — I think it was three years after we were working that we had a party for him up there. It might have been '82, I don't know, '80 or '82. But I know I was involved with one party. That was me, Dick Cashman, and Dick Waltman.

FICCO: How many other times did you give Nick money?

RUGGERIO: No I turned the money into, just like when we had the party for, we had a party for Don up there, I turned the money right into the people, to Cashman, and he turned it

right over to Mowry; and also in Bloomsburg, the same thing, when they had a party at the Elks in Bloomsburg; just turned it right over.

FICCO: How did you pay the 500 Club?

RUGGERIO: How?

FICCO: Was it cash or did you pay him by check?

RUGGERIO: No, I wrote a check.

FICCO: You wrote a check?

RUGGERIO: I'm almost sure I did, yeah. I might buy a \$25 ticket cash, but I never . . .

FICCO: Yeah.

RUGGERIO: Anything two, three hundred dollars, I have checks for.

FICCO: Was there any check you ever gave to Benedict?

RUGGERIO: I think so, to pay the 500 Club. I don't think I gave him any money up until that time; except like I said, \$25 or \$50 tickets some place, and some other county had a party.

FICCO: I think that's all I had.

MCANENY: Is that the area where they used to have the golf outing?

RUGGERIO: I wasn't to that one. Were you up there to that?

MCANENY: No. All I remember is that there used to be a golf outing there.

RUGGERIO: They had a party, I think they had a party in October, I think, that time, but I wasn't there." Like I said, I didn't meet — I met him later on after they had that party for him. I wasn't even there, or I didn't donate anything to that party either.

FICCO: I think Biggica.

MCANENY: I don't know who it was. All I remember is that there used to be a golf outing.

FICCO: I do realize that people came out with Russ Biggica and John Clark.

RUGGERIO: How long have you been working here? I don't . . .

FICCO: I started in '80.

RUGGERIO: '80.



MCANENY: Okay, well, Mr. Ruggerio I want to thank you for coming in, especially considering that you are on worker's comp. I want you to be aware of the fact that, I'm sure you are aware from newspapers and press coverage, that the issue of 20 names provided by the U.S. Attorney's Office to this department has become a political football for the auditor general's opponent, and I want you to be assured that Don Bailey has not intention of disclosing the names of people simply because of an accusation where there's no evidence of any wrongdoing on their part. All that would serve is to link innocent people up with accusations, and ruin your reputation, or at least damage it severely.

RUGGERIO: I'm 100 percent behind Don.

MCANENY: Now, to the same extent, I want you to understand that this entire interview, everything we've discussed is to be held in absolute confidence. You can discuss it with appropriate authorities, if they ever ask you about it; the attorney general, or whoever, or you can talk about it with your private legal counsel. Other than that, I don't want you talking about it with anyone.

RUGGERIO: Not even say anything to Dick.

MCANENY: And this is under specific instructions of the auditor general.

RUGGERIO: Don't say anything even to Dick?

MCANENY: Right.

RUGGERIO: Okay, because he was involved with it.

MCANENY: Don't want anybody talking to anybody about it. All that's going to do is increase the likelihood of a rumor starting that says, that this individual's one of the people. We don't need that, you don't need that.

RUGGERIO: No I don't.

MCANENY: And where there's no evidence of any wrongdoing on anyone's part, no basis for any kind of disciplinary action for us to take, there's certainly no reason why we would want the names released. Don, of course, from a political point of view, would probably find it easier to release the names, but from a fairness point of view, it's not right, and he's made the decision not to do that. You should be aware that he will consider the most severe discipline he can come up for breach of

this confidence, and that's for your protection, and every other person that's called in to talk to us in this matter, has been given the same warning.

RUGGERIO: You have 100 percent guarantee from me. I won't mention it from this table.

MCANENY: Alright, I appreciate that, and I guess we can finish.

— END OF STATEMENT —

### AFFIDAVIT

I, \_\_\_\_\_  
(have had read to me) (have read) this statement which begins on page (1) and ends on page 10. I fully understand the contents of the entire statement made by me. This statement is true. I have initialed all corrections and have initialed the bottom of each page containing statement matter. This statement has been made by me freely without hope of benefit or reward, without threat of punishment, and without coercion, unlawful influence, or unlawful inducement.

\_\_\_\_\_  
(Signature of Person Making Statement)

SWORN TO AND SUBSCRIBED BEFORE ME THIS 6th day of October 1988, AT Harrisburg, PA.

\_\_\_\_\_  
Special Agent  
Bureau of Investigations  
Department of the Auditor General

This oath is administered by virtue of the authority vested in me by Don Bailey, Auditor General, pursuant to the provisions of Section 517 of the Act of April 9, 1929, P. L. 177, as amended.



## WITNESS STATEMENT

I, James Dicosimo, have been informed by Jim McAneny and Nick J. Ficco, Jr. who stated are Chief Counsel and Bureau Director with the Bureau of Investigations, Auditor General's Department, Commonwealth of Pennsylvania, and that he is conducting an investigation of alleged job selling.

MCANENY: Today is October 3, 1988, the time is 2:34 p.m. 3:34 p.m., it's been one of those days. Alright, my name is James McAneny, I'm Chief Counsel in the Department of the Auditor General, with me is Nick Ficco, Director of the Bureau of Investigations, and James Dicosimo, who is an employee of the department. Mr. Dicosimo, the reason you've been asked to come in here is because we're conducting an internal investigation of certain allegations what we have received from the U.S. Attorney's Office. Those allegations are that certain employees, current employees of the department engaged in some form of wrongdoing under the Benedict Administration, primarily relating to the job selling scheme. The purpose of our investigation is not criminal. We do not do criminal investigations. It is to determine if at this point in time evidence exists which would justify the position of some form of discipline or other administrative remedy. However, because of the nature of the accusations, and the possibility that evidence of criminal misconduct could arise from this investigation. You should be aware that, for the purpose of this interview, you do have a right to have counsel present, if you would so desire. If you wish, we could suspend the interview right at this point, you'll have an opportunity to contact your counsel, set up a future date when he can be present. Alternatively, we could proceed at this point, but if at any time during the interview, if you wish to, you can just stop it. It won't hurt your detriment, you won't be prejudiced by it.

DICOSIMO: Okay.

MCANENY: We'll terminate the interview, at that point, seek legal counsel, reconvene at a date when he can be present. Do you understand that?

DICOSIMO: Yep.

MCANENY: Do you wish to proceed?

DICOSIMO: Proceed.

MCANENY: I will ask you to try to speak up for the mike.

DICOSIMO: Okay.

MCANENY: Thank you.

FICCO: Please raise your right hand. Do you swear that the testimony you're about to give here today is true and correct to the best of your knowledge and belief?

DICOSIMO: I do.

FICCO: Please state your full name for the record?

DICOSIMO: My name is James Dicosimo.

MCANENY: Mr. Dicosimo, I'm going to have a heck of a time saying it. I got to hit the "s" in the first syllable too, don't I? DiScosimo.

DICOSIMO: No, it's actually Dicosimo is the right pronunciation.

MCANENY: Dicosimo.

DICOSIMO: That's exactly right.

MCANENY: I'll work at it.

DICOSIMO: That's correct; however, people call me Dicosimo, who we go by that. That's the easy way, it's the American way of doing it, saying, it. But we know it's Dicosimo, okay.

MCANENY: Whatever. Sitting over here, the lone Nick in the room. We have that straighten out. When did you start working for the Department of the Auditor General?

DICOSIMO: January 14, 1980.

MCANENY: And in what capacity were you hired?

DICOSIMO: As a field auditor 3.

MCANENY: Did you believe at that time that it was unusual that you would be hired as a three level instead of as a one?

DICOSIMO: No, No. I had worked at the Atlantic City Tea Company, and I had a — then I served as a county commissioner back home, and I had the credentials for this particular job. I had worked at Personnel for the United States Army for two years for this particular job. I mean I had worked at Personnel in the United States Army for two years.

MCANENY: What job were you given, what bureau were you hired to?

DICOSIMO: County Bureau of Audits.

MCANENY: Bureau of County Audits?

DICOSIMO: Uhum. Bureau of County Audits, yeah.

MCANENY: Okay. The fact that you had background as a county commissioner I'm sure was an assistance.

DICOSIMO: I would think so, eight million dollar budget annually.

MCANENY: How did you get that job?

DICOSIMO: How did I get that job?

MCANENY: Uhum.

DICOSIMO: Well, during the particular time, I've always been involved politically through the years. I served on the Executive Board of the Democratic Party, even during the term of Bob Casey, when he was auditor general, and Guido and I have been very close friends, and have been.

MCANENY: Guido?

DICOSIMO: Alesi, and we've been very close friends, and served on the Executive Board when he was county chairman. And through the years we have worked hard politically of all these particular years; and during that course of time that we had done a county wide reassessment, I had served three terms of county commissioner, I had told him that I had the opportunity in our union contract to go back with A&P. As a matter of fact, I served on the union negotiation team, negotiated what's in the contract, that any employee that was elected to public office, would be given a bonafide leave of absence to coincide with his term of office, and go back to A&P whatever time I chose. However, at that time, I was defeated in the election. We had done a county wide reassessment, and lost by 45 votes. And I filled out an application to work, Guido got me the application to work in the auditor general's department, and I chose to do that. I could have gone back, as I said, with A&P.

MCANENY: Did you make any financial contributions about the time of the, in fact specifically, did you ever give \$1,000 in cash?

DICOSIMO: No way.

MCANENY: To Mr. Alesi, or to Mr. Kerr, or Mr. Benedict?

DICOSIMO: No way, no way.

MCANENY: Did you make any other contribution about the time that you were given the job?

DICOSIMO: I made a — I joined the 500 Club, which I, by the way I still have my, I keep my records of all my checks; and as a matter of fact, I've carried them in my possession if you wish to see them.

MCANENY: . . . no, no, no.

DICOSIMO: Alright, I donated \$500 to the Al Benedict 500 Club, I donated \$250 to the Democratic State Committee, and think there was another hundred and some dollars during that particular year, I gave in a check. I always gave my contributions by check, by the way.

MCANENY: I feel like I'm wasting my time here. I know that I'm wasting my time. Mr. Dicosimo, did you tell me that you actually brought the checks with you today?

DICOSIMO: I always carry them in my possession, I've had them, I carry them in my wallet. After I went through for the last eight or nine years. I've carried them and they've turned color, believe me.

FICCO: Is that right.

DICOSIMO: Yes I have.

MCANENY: Tell me about what you went through in the last eight or nine years? Have you been questioned about this before?

DICOSIMO: Yes, I was before the State Grand Jury. It's getting to be a — it's getting to the point that it becomes harassment after a while.

MCANENY: I understand that.

DICOSIMO: And I've always carried them. I was before the State Grand Jury, and I told him the same thing I'm telling you; and you know, you get sick and tired of it eventually.

MCANENY: That was Grand Jury that was conducted by James West as the assistant district attorney?

DICOSIMO: No, I went before the State Grand Jury that was conducted by Claus.

MCANENY: Lawrence Claus?

DICOSIMO: That's right. Leroy Zimmerman's attorney general.

MCANENY: That was late in the proceeding then.



DICOSIMO: That was in — back in 1983.

MCANENY: Okay.

DICOSIMO: 1983.

MCANENY: Did you testify at the trial as well?

DICOSIMO: At the trial?

MCANENY: At John Kerr's trial?

DICOSIMO: No, no. I just was there as a witness before the Grand Jury, and I told them the same thing that I'm telling you today. Everything I've told you today I told them; so there's nothing any different.

MCANENY: Okay, do you have anything Nick?

FICCO: No sir.

MCANENY: I don't have anything either, nope.

DICOSIMO: Okay.

MCANENY: There's something I have to add, however.

DICOSIMO: Okay.

MCANENY: Oh, have you ever been questioned by anybody since then about this matter?

DICOSIMO: By? No, no.

MCANENY: Alright, so the FBI hasn't come to talk to you?

DICOSIMO: No.

MCANENY: The U.S. Attorney's Office hasn't come to talk to you?

DICOSIMO: No, no.

MCANENY: Have you've discussed it with Mr. Alesi?

DICOSIMO: Not in detail or anything like that, no. There was nothing there that we discussed.

MCANENY: Alright. I am done. I have one warning to give, please allow me to do so.

DICOSIMO: Okay.

MCANENY: The auditor general has instructed Nick and I to personally handle this investigation; no one else is involved in it. We are keeping the lid on, so to speak. As I'm sure you're aware, Mr. Bailey's political opponent is making a lot of noise about demands for public disclosure of the list of 20 names provided by James West. The auditor general has no intention of providing any list of names to Mrs. Hafer or to the public where the evidence would indicate that all you're doing is identifying persons accused, but you did nothing wrong. All that can

possible do is damage the reputation of those employees without any basis. In that same regard, we have been instructed to tell everyone that comes in at this interview, the matter of the entire investigation, must remain strictly confidential. You were brought in by the Personnel Office, you were brought in by the Personnel Office, period. You do not say who you saw in this building today, you do not discuss the nature of our meeting, and the one thing that will result in disciplinary action would be the disclosure of information, other than to your private counsel, or if you're contacted by the U.S. Attorney, or the Attorney General, or somebody like that and four more years you got to do this over again, do you understand that?

DICOSIMO: Yeah.

MCANENY: Do you agree to it?

DICOSIMO: Yeah.

MCANENY: Okay, we're done.

— END OF STATEMENT —

#### AFFIDAVIT

I, \_\_\_\_\_  
(have had read to me) (have read) this statement which begins on page (1) and ends on page 7. I fully understand the contents of the entire statement made by me. This statement is true. I have initialed all corrections and have initialed the bottom of each page containing statement matter. This statement has been made by me freely without hope of benefit or reward, without threat of punishment, and without coercion, unlawful influence, or unlawful inducement.

\_\_\_\_\_  
(Signature of Person Making Statement)



SWORN TO AND SUBSCRIBED BEFORE ME THIS 3rd  
day of October 1988, AT Harrisburg, PA.

---

Special Agent  
Bureau of Investigations  
Department of the Auditor General

This oath is administered by virtue of the authority vested in me by Don Bailey, Auditor General, pursuant to the provisions of Section 517 of the Act of April 9, 1929, P. L. 177, as amended.

### WITNESS STATEMENT

I, Louis Jurik, have been informed by Jim McAneny and Nick J. Ficco, Jr. who stated are Chief Counsel and Bureau Director with the Bureau of Investigations, Auditor General's Department, Commonwealth of Pennsylvania, and that he is conducting an investigation of alleged job selling.

MCANENY: Today is Friday, October 14, 1988, the time is 2:47 p.m. My name is James McAneny, I'm Chief Counsel in the Department of the Auditor General, with me is Nick Ficco, Director of the Bureau of Investigations, and Louis Jurik, a Field Auditor 3, in the Bureau of School Audits. Louise, the reason we've asked you to come in is because our department has been provided with certain information from the United States Attorney's Office, contained to primarily their allegations of possible misconduct under the Benedict administration. We, Nick and I have been assigned to interview people with regard to these allegations, and the purpose of our investigation is to determine if there is any disciplinary or other type of administrative action should be taken by the department. The nature of the allegations, however, are such that it is possible that evidence of criminal wrongdoing could be disclosed as a result of our investigation; and because of that possibility, we've advised everyone that they have a right to have counsel be present for any interview. That right can be asserted now, before we begin, or if you would prefer, we can begin questioning, and if at any point you decide that you want to stop until after you have a chance to consult with counsel, we can do it at that point, and you have a chance to go out and get a lawyer, and have them be present for any continuation.

JURIK: Are we talking about the job selling?

MCANENY: Yes, basically that's the — that is the type of allegations.

JURIK: To what extent?

MCANENY: Not greatly.

JURIK: To me?

MCANENY: Primarily there is an allegation of some possible payment involving a promotion you may have received. I don't know what promotion they're referring to, and I don't have

dates, as to the allegation that we have received doesn't provide a lot of specifics.

JURIK: The only promotion I've received is when I became a Field Auditor 3, is this what we're talking about?

MCANENY: I guess it must be.

JURIK: Well, I can assure you there was no payment.

MCANENY: I understand that. Do you want to proceed with the statement at this point.

JURIK: I can.

MCANENY: And if you change your mind, we'll stop.

JURIK: I understood that my three was based, it was a meritorious increase, and it was due to the Clarion School District audit, that I think you worked with Jim.

MCANENY: Yes.

JURIK: And the McKeesport School District Audit.

MCANENY: Okay.

JURIK: And at that time, and I think there were probably letters I received, and they may in my personnel file, letters of commendation, for those two particular audits, from Mr. Benedict.

MCANENY: Let me ask you a specific question. Did you know a gentleman named John Lignelli?

JURIK: Yes I did.

MCANENY: And what was your relationship with John?

JURIK: Not good. John Legnelli and I don't even speak. As a matter of fact, during Don Bailey's election, when he ran for election for Senator, okay; he and I really got into it. I don't know how else to describe it; and I went to the council meeting, and I asked him, at that time, to resign because of some statements he made at my house. He came down onto my porch.

MCANENY: What council meeting was that?

JURIK: I have a letter from Mr. Bailey. Let me just show it to you. Where he, I'm sure that is what it is referring to in this letter where he thanked me. I think this is it.

MCANENY: Okay, for the record, this is a letter on stationery of Pennsylvanians for Bailey, signed by Don Bailey, it's dated July 28, 1986, and it's addressed to Louise Jurik, and it states, "I want to say thank you with all my heart for supporting my candidacy for the United States Senate. Dorothy

Smyde told me of the tremendous help given during the campaign and I'm sincerely and deeply grateful. The enthusiasm and spirit of assistance like yours is our core inspiration. Above all, the campaign was run in a way that can make us all proud. Once more, and always Louise, my most heartfelt gratitude. Sincerely yours, Don Bailey."

JURIK: And I assume that this was the answer that he referred to in the letter.

MCANENY: When you referred to the council . . .

JURIK: I'm sure I have a newspaper article at home.

MCANENY: What council is that?

JURIK: It's a local council; the Borough of Donora. John Lignelli sits on the council.

MCANENY: Okay, it's Borough Council itself.

JURIK: Right.

MCANENY: Okay, are you a council member?

JURIK: No I'm not, but I asked for permission to speak at that particular council meeting.

MCANENY: On behalf of?

JURIK: Well I felt that . . .

MCANENY: Mr. Bailey's candidacy?

JURIK: No, no. John was putting literature up for, who ran against Mr. Bailey, Edgar?

FICCO: Edgar, Bob Edgar.

JURIK: . . . on the utility poles, and I tore them down, and I called the utility company to see whether this was against the law to litter their poles. So when he found out what I had done, he came down to my house that afternoon, this was primary election day, and he said to me that he was sick and tired of me, and I was getting to be, I'm going to tell you what he said, a real pain in the you know what; and we had a few other choice words, and he left. So the next council meeting I requested to speak; and I said at any time he thought he could come down onto my front porch and use that kind of language to me . . .

MCANENY: But to go back to the Benedict administration, briefly.

JURIK: Okay.

MCANENY: We just want to get this wrapped up as quickly as we can.

JURIK: That's quite alright.

MCANENY: Back in 1983 or I guess maybe even 1982, was Mr. Lignelli involved, to your knowledge, in fund raising for Mr. Benedict or Mr. Benedict's campaign?

JURIK: I don't know whether he was involved with fund raising. I know that he had tickets for the affairs, okay.

MCANENY: To your recollection, did you ever deliver any money to Mr. Lignelli for any of Mr. Benedict's campaigns?

JURIK: I purchased my tickets through George Spatana, who was our regional supervisor at that time. I did not deliver — we weren't on that good terms for me to do something like that.

MCANENY: So you basically just didn't deal with Mr. Lignelli?

JURIK: No I didn't. The only time I dealt with Mr. Lignelli is if I had a problem with my car. He was the automotive officer, okay.

MCANENY: Okay.

JURIK: And that is the only time.

MCANENY: And to be specific, did you ever give John Lignelli \$1,000 to convey to John Kerr for the purpose of obtaining a promotion?

JURIK: Absolutely not.

MCANENY: Have you ever been questioned by anybody else regarding this kind of thing?

JURIK: No. I have never been questioned by the attorney — I knew that there were people that were being called in, but I had never been questioned.

MCANENY: You were never questioned by the attorney general?

JURIK: This is why I was amazed. No.

MCANENY: You weren't questioned by the auditor general when they did the investigation back . . .

JURIK: I wasn't questioned by anyone. This is the first time.

FICCO: I never recollect her name ever coming up.

JURIK: This is the first time this ever came up.

MCANENY: You've never been questioned by the FBI or the U.S. Attorney?

JURIK: No one. This is why I couldn't understand why I was coming in today; especially to investigation. I knew job selling people were coming in because there were a couple that were called in that I know. But when I got called in, I thought, this certainly can't be for that.

MCANENY: Nick do you have any questions.

FICCO: No.

MCANENY: Alright Louise, I really want to thank you for coming in. I realize this pretty well blew a perfectly good Friday, but it's something that we had to do.

JURIK: Oh I understand that. I'm glad if there was a question, I'm glad to come in.

MCANENY: We're just trying to get the thing resolved.

JURIK: Let me ask you a question now.

MCANENY: Sure.

JURIK: Was my name supposedly on that list that those 20 employees, that we had heard about or read about in the newspaper? Because if it was, Jim, this was the first time.

MCANENY: Well, I understand that. You read about the list of the 20 names in the newspapers, sure.

JURIK: Yeah, it's in the local papers, yeah.

MCANENY: Everybody, I think, had heard about that, and I assume you've also heard that Mr. Bailey's opponent has called for the disclosure of the 20 names.

JURIK: Yes, I have read that.

MCANENY: What I would like you to understand is that Mr. Bailey has no intention of disclosing the names, and in support of that, we've been instructed to advise you, as we've advised everyone else we've talked to, that the nature of this meeting is to be kept confidential.

JURIK: Okay.

MCANENY: You can discuss it with a private lawyer, and you can discuss it with — these are the people you can talk to, okay.

JURIK: Okay.

MCANENY: It's alright to talk about it with your lawyer, it's alright to talk to an investigating agency, if the ever ask you about it. But other than that, it's best that you don't discuss it with anyone. We're trying to keep the rumors down to a



minimum. We don't think that it's proper to have people defamed simply because they've been accused of something when there is no evidence to support the accusation, alright. We are completing our investigation, and it will be handled appropriately, but without release of names. I want you to understand that.

JURIK: Okay.

MCANENY: The auditor general will use any disciplinary action that is within his power to anyone that breeches the confidentiality of these meetings.

JURIK: Okay.

MCANENY: And you should be aware of that. I mean, we are not looking to have this thing be turned into a political football, in spite of the way it's been treated by the other side.

JURIK: I would just like to know who my accuser is, really. If it's John Lignelli, then I think he's being very vindictive.

MCANENY: I understand how you feel. I don't — we don't really have a firm identity of an accuser, unfortunately, with the nature of the information that has been provided to us. So I can't say that it is Mr. Lignelli, or who it is. It's simply certain bare bones allegations that have been provided to us by the United States Attorney's Office for our investigation, and this meeting is designed to resolve those accusations.

JURIK: Well, I want to say one other thing, Jim. When we were working during that time, I was hired under Bob Casey. During Mr. Benedict's term as auditor general, when we were working, I think, and I can say this, I think for some of the older people, employees, you can almost pick out those persons. Understand what I'm saying?

MCANENY: Yeah.

JURIK: And that was common knowledge, and I was never, you know. This is what I don't understand; how my name got on that list.

FICCO: Stranger things have happened.

JURIK: I know when you, when an auditor.

MCANENY: Well, there are some very strange names on the list, don't worry about it.

JURIK: Okay, well then I feel better that I'm not alone in this, okay.

MCANENY: Thank you then.

JURIK: That's quite alright.

— END OF STATEMENT —

### AFFIDAVIT

I, \_\_\_\_\_  
(have had read to me) (have read) this statement which begins on page (1) and ends on page 7. I fully understand the contents of the entire statement made by me. This statement is true. I have initialed all corrections and have initialed the bottom of each page containing statement matter. This statement has been made by me freely without hope of benefit or reward, without threat of punishment, and without coercion, unlawful influence, or unlawful inducement.

\_\_\_\_\_  
(Signature of Person Making Statement)

SWORN TO AND SUBSCRIBED BEFORE ME THIS  
14th day of October 1988, AT Harrisburg, PA.

\_\_\_\_\_  
Special Agent  
Bureau of Investigations  
Department of the Auditor General

This oath is administered by virtue of the authority vested in me by Don Bailey, Auditor General, pursuant to the provisions of Section 517 of the Act of April 9, 1929, P. L. 177, as amended.

## WITNESS STATEMENT

I Karol Danowitz, have been informed by Jim McAneny and Nick J. Ficco, Jr. who stated are Chief Counsel & Bureau Director with the Bureau of Investigations, Auditor General's Department, Commonwealth of Pennsylvania, and that he is conducting an investigation of alleged job selling.

MCANENY: Alright, today is Thursday, October 6, 1988, the time is 1:22 p.m. My name is James McAneny, I'm Chief Counsel with the Auditor General's Department, with me is Nick Ficco, Director of the Bureau of Investigations, and Karol Danowitz, an employe of the department. Karol, the reason we asked you to come is because we are conducting an internal review of various allegations that our department has received from the U.S. Attorney's Office concerning representations of misconduct under the Benedict Administration. The purpose of our investigation is to determine if any disciplinary action could be warranted at this time; but you should be aware that the nature of the allegations that have been transferred to us or transmitted to us, could, if proven, possibly be deemed to be criminal acts, and that if we, and of course, if our investigation would uncover any evidence that should indicate criminal responsibility by any person, we would be required to report that information to the appropriate authorities.

DANOWITZ: What is this in reference to, specifically?

MCANENY: Specifically this is in reference to allegations regarding the job selling scandal that occurred under the Benedict administration.

DANOWITZ: I was questioned by the FBI.

MCANENY: I understand that, but before we proceed any further, just let me finish with this introduction so you understand where we are coming from.

DANOWITZ: Alright.

MCANENY: You would, at this time, have a right to have counsel present, if you desire, for this interview. Our interview is not criminal in nature; it's just administrative. But, if you would wish to proceed at this point, with any type of statement, we would allow you to interrupt at any time and have counsel be present in the future. I can tell you that the information that we

have at this point does not indicate that you are criminally responsible in any way, but your name was given to us, along with a number of others, and we are required to at least investigate the matter to see if there is anything from an administrative point of view that should be done. Now my question would be, do you wish to proceed at this point, or do you want to stop and have counsel be present for the future.

DANOWITZ: No, at this point I don't see there's any reason to stop.

MCANENY: Okay, Nick if you would administer the oath.

FICCO: Raise your right hand Karol.

DANOWITZ: Uhum.

FICCO: Do you swear that the testimony you are about to give us this day is true and correct to the best of your ability and knowledge?

DANOWITZ: Absolutely.

FICCO: Please state your full name for the record?

DANOWITZ: Karol S. Danowitz.

MCANENY: Alright Karol, I'm sure, as you mentioned, you've been questioned about this before, and I would imagine that this is exactly the same things you were questioned about in the past. Basically, the information deals with your original employment in the Department of the Auditor General. Could you describe for us, briefly, what you know of the circumstances under which you were hired?

DANOWITZ: Okay, let's see, my husband, at one point, worked with Joe Thor; I think in the same accounting firm, and to the best of my knowledge, he approached Joe Thor, was there a job in the Auditor General; and I went in, got an application, filled out applications, I took them back, and then I — I cannot remember if I was called in for an interview or not, okay.

MCANENY: Okay.

DANOWITZ: After a period of time, I was called and informed that I had a job with the Bureau of Typing and Duplicating.

MCANENY: Alright, did at any time, and here I should advise you that there is a statutory privilege concerning communications between husband and wife, okay; and I cannot ask



you to violate that privilege. Certainly you should have consultation of counsel regarding anything, but other than a communication from your husband to you, other than the discussion that your husband may have had to you, do you know of, or were you ever advised that any money had changed hands to obtain that job for you?

DANOWITZ: Absolutely not. As a matter of fact, I'll tell you this. After I was questioned by the FBI, we do not speak at all, but I called him and I told him, and I said point blank to him, I said, he had been questioned by the FBI too. I said, "Harvey, did you pay for my job?" And he said, "No I did not."

MCANENY: When were you questioned by the FBI.

DANOWITZ: Oh boy, maybe it was last fall.

MCANENY: And it was basically the same kind of questions?

DANOWITZ: Basically the same kind of questions. My ex-husband said he had been questioned twice.

MCANENY: He's your ex-husband; you're divorced?

DANOWITZ: Yes.

MCANENY: Were you divorced at that time, or you were still married?

DANOWITZ: We were still married, at the time I got the job. We were still married then. He had also told me that he works with Irving Amberbaum, he had been questioned.

MCANENY: Do you mean Harvey Amberbaum.

DANOWITZ: Whatever.

MCANENY: Former deputy auditor general?

DANOWITZ: Yeah that's the one, yeah, okay. He works with him, he works for the same accounting firm in Elizabethtown that he works for.

FICCO: What firm is that, Karol.

DANOWITZ: Oh that's a good question. I don't know. Felty and Company, maybe, something like that. Unless they changed the name, but that . . .

MCANENY: Have you ever been questioned by anyone other than the FBI?

DANOWITZ: No.

MCANENY: Were you asked to appear before the Grand Jury?

DANOWITZ: No, no. They came to my apartment and they questioned me there.

MCANENY: Okay, and you say that your husband said they had talked to him as well.

DANOWITZ: They had talked to him as well, and he said he did not.

MCANENY: Okay, Nick, do you have anything?

FICCO: No, that pretty much wraps it right there.

MCANENY: Alright Karol, I really want to thank you for coming in and cooperating like this. I would like to tell you that, I'm sure you've read the papers, or heard on the news that the auditor general's opponent in this election has called for the disclosure of names of people that were turned over to us by the United States Attorney's Office.

DANOWITZ: I don't think she has any right with those names.

MCANENY: That is also the opinion of the auditor general, so that you are aware of that.

DANOWITZ: I don't think she has any right to those, and I -- you know, she may never be elected auditor general.

MCANENY: Karol, what I want you to understand is that our position, and the position of the auditor general, is that only those persons who absolutely must know are aware of the names. That consist of the auditor general, Nick, and myself. At this point, we are, to my knowledge, the only ones that have access to the full list. The people that have been asked to come in, like yourself, we are instructed to tell all of you, other than discussion with appropriate legal authorities of the FBI or the Attorney General, or somebody wants to talk to you about this interview, of course, you tell them anything, you tell them the truth, tell them what happened here.

DANOWITZ: Yeah.

MCANENY: Other than that, if you want to discuss it with your private legal counsel, you're free to do that as well. With those exceptions, this is to stay confidential. We don't want . . .

DANOWITZ: And everybody is going to question me, because I made one mistake of telling somebody in my bureau that I was coming down here, and he made a joke of it, and he informed everybody in the bureau that I was coming down here.



MCANENY: That you were coming to this office, or that you were going to Personnel.

DANOWITZ: I was going to Personnel.

MCANENY: Going to Personnel is fine. That's the way we've had everybody brought in as to Personnel. It's a Personnel matter, okay. No one has been called in to Investigations to be interviewed. Everybody has been called into Personnel. Surprisingly enough, all kinds of people get called into Personnel everyday, so it's not that big a deal. But there is no way they should be able to identify the two. We want this to stay confidential.

DANOWITZ: What do I tell the people upstairs? Give me a quick tricky?

MCANENY: Just tell them you had to go down to Personnel for something. You don't have to tell them that you came to see us.

FICCO: Deputy Almasi wanted to talk to you about some personnel matters.

DANOWITZ: About how we — I got it, I got it, how we deal with the warrants when they come in.

MCANENY: Whatever, you don't have to have — you don't have to tell them about the real reason why, okay.

DANOWITZ: Okay, that's it.

MCANENY: We don't want rumors and names being banded around the Commonwealth; because just being attached to an accusation can cause you a lot of embarrassment and that, and I'll be quite honest with you, accusations at this point are all we have. We haven't found any real substances to . . .

DANOWITZ: Anybody.

MCANENY: Well, it's all like this, old stuff that they have fully investigated, and what they expect us to be able to do about it is beyond me. Because if your husband did something wrong, there's no way that we can take action against you for that. Even if he did, no, even if he did, I'm just saying, if they accuse, say your husband bought you a job, how can we discipline you for that if you're not aware of it and you're not a part to it; even if he did it, and I'm not saying he did it. But the problem is the accusation alone can cause you a lot of problems. We don't want the fact that you were talked to by us bandied about.

DANOWITZ: See also, this Felty & Company, this . . . he just started this, he was a CPA for Benedict.

FICCO: He was?

DANOWITZ: Wasn't he the one? He was the CPA for Benedict.

MCANENY: I believe so.

DANOWITZ: So you know, they could have, my job could have just been a political favor.

MCANENY: I seemed to remember that they used to do some of the accounting work for either his personal stuff or his campaign stuff.

DANOWITZ: I'm sure of it, yeah. See so I'm sure my getting this job was purely a political favor, so to speak.

MCANENY: Okay, Well we thank you.

— END OF STATEMENT —

#### AFFIDAVIT

I, \_\_\_\_\_  
(have had read to me) (have read) this statement which begins on page (1) and ends on page 7. I fully understand the contents of the entire statement made by me. This statement is true. I have initialed all corrections and have initialed the bottom of each page containing statement matter. This statement has been made by me freely without hope of benefit or reward, without threat of punishment, and without coercion, unlawful influence, or unlawful inducement.

\_\_\_\_\_  
(Signature of Person Making Statement)

JA-168

SWORN TO AND SUBSCRIBED BEFORE ME THIS 6th  
day of October 1988, AT Harrisburg, PA.

\_\_\_\_\_  
Special Agent  
Bureau of Investigations  
Department of the Auditor General

This oath is administered by virtue of the authority vested  
in me by Don Bailey, Auditor General, pursuant to the provi-  
sions of Section 517 of the Act of April 9, 1929, P. L. 177, as  
amended.

JA-169

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES C. MELO, JR., et al.	:	
	Plaintiffs,	CIVIL ACTION
v.	:	NO. 89-2935
	:	
BARBARA HAER	:	
and	:	
JAMES J. WEST, ESQUIRE	:	
	Defendants.	
	:	
	:	CIVIL ACTION
CARL GURLEY, et al.	:	NO. 89-2685
	Plaintiffs,	
v.	:	
	:	
BARBARA HAER	:	
	Defendant.	

DECLARATION OF BARBARA B. CHRISTIANSON

I, Barbara B. Christianson, hereby declare under the  
penalties of perjury to 28 U.S.C. § 1746 that the following is  
true to the best of my information, knowledge and belief:

1. Since January 17, 1989, I have been personnel director  
for the Office of Auditor General of the Commonwealth of  
Pennsylvania, I am submitting this declaration in support of  
defendant Barbara Haer's motion for summary judgment in  
*James C. Melo, Jr., et al v. Barbara Haer and James J. West*,  
C.A. No. 89-2935, currently pending in the United States  
District Court for the Eastern District of Pennsylvania and *Carl  
Gurley, et al v. Barbara Haer* Civil Action No. 89-2685, also  
pending in the United States District Court for the Eastern  
District of Pennsylvania. Statements contained in this declara-  
tion are all made on the basis of my own knowledge.

2. As personnel director for the office of Auditor General, I  
am the custodian of the records of all personnel files and records.  
As such, I am personally familiar with the authenticity of those  
records and verify that the following statements are true and  
correct based upon my personal review of the records of the  
following persons on file at the Office of Auditor General:

- (1) James C. Melo, Jr.;
- (2) James DiCosimo;
- (3) Karol Danowitz;
- (4) Louise Jurik;
- (5) Donald Ruggerio;
- (6) John Weikel;
- (7) Walter Speelman;
- (8) Lucille Russell;
- (9) Carl Gurley;
- (10) W. Gerard Best;
- (11) Michael Brennan;
- (12) Margaret Casper;
- (13) Elizabeth Buchmiller;
- (14) Daniel Clemson;
- (15) Mary Fagar;
- (16) George Franklin;

3. A true and correct copy of the Office of Auditor General's collective bargaining agreement is attached to this motion as Exhibit "36".

4. Of the plaintiffs in these cases, the following persons are subject to that collective bargaining agreement:

- (1) James DiCosimo;
- (2) Karol Danowitz;
- (3) Louise Jurik;
- (4) Donald Ruggerio;
- (5) John Weikel;
- (6) Walter Speelman; and
- (7) Lucille Russell.

5. The collective bargaining agreement provides for arbitration of grievances relating to discharge and each of the above-listed plaintiffs have filed a grievance seeking arbitration.

6. The remaining plaintiffs listed below are not subject to the collective bargaining agreement:

- (1) James Melo, Jr.;
- (2) Carl Gurley;
- (3) W. Gerard Best;
- (4) Michael Brennan;
- (5) Margaret Casper;
- (6) Elizabeth Buchmiller;

- (7) Daniel Clemson;
- (8) Mary Fagar;
- (9) George Franklin;

7. Each of the plaintiffs in these cases was terminated via correspondence which has been placed in their personnel files. True and correct copies of these termination letters have been attached hereto as Exhibits "19"- "34". It is the policy of the Office of Auditor General that such termination letters are strictly confidential and are not made public nor shown to anyone, even prospective employers who specifically request the information.

8. The termination letters attached as Exhibits "19"- "34" have not been shown to anyone nor will they be shown to anyone in the future.

9. It is also the policy of the Office of the Auditor General that the information which is made public concerning past employees is statutorily provided as public information:

- (1) Date of hiring;
- (2) Dates of employment;
- (3) Date of termination;
- (4) Birth date;
- (5) Job classification;
- (6) Salary; and
- (7) Headquarter county.

10. No information concerning the basis for a termination is made public or given to prospective employers or other parties requesting that information.

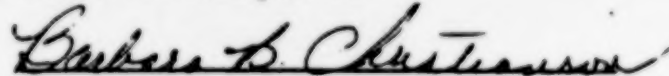
11. Nowhere in the plaintiff's personnel files is there any mention of their political affiliation.

12. At no time have I been aware of the political affiliation of any of the plaintiffs nor did political affiliation play any part in the decision to discharge them from their positions with the Office of Auditor General.



JA-172

13. On February 1, 1989, the Office of Auditor General employed 783 persons. This number is based upon my personal review of the payroll records for that period.



Barbara B. Christianson

Dated: 8-7-89

JA-173

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JAMES C. MELO, JR., et al.	:	CIVIL ACTION
v.	:	NO. 89-2935
BARBARA HAHER	:	
and	:	
JAMES J. WEST, ESQUIRE	:	
CARL GURLEY, et al.	:	CIVIL ACTION
v.	:	NO. 89-2685
BARBARA HAHER	:	

**PLAINTIFFS' ANSWER TO MOTION FOR SUMMARY  
JUDGMENT OF DEFENDANT BARBARA HAHER**

For the reasons set forth in the attached Memorandum of Law and in consideration of the documents included in the Appendix, all of which are incorporated herein by reference thereto, plaintiffs respectfully submit that defendant Hafer's Motion for Summary Judgment should be denied.

GROEN, LAVESON, GOLDBERG,  
RUBENSTONE & FLAHER

BY: \_\_\_\_\_  
WILLIAM GOLDSTEIN, ESQUIRE  
Four Greenwood Square  
Suite 200  
Bensalem, PA 19020  
(215) 638-9330  
Counsel for Plaintiffs

Dated: August 31, 1989

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JAMES C. MELO, JR., et al.	:	CIVIL ACTION
v.	:	NO. 89-2935
BARBARA HAFER	:	
and	:	
JAMES J. WEST, ESQUIRE	:	
	:	
CARL GURLEY, et al.	:	CIVIL ACTION
v.	:	NO. 89-2685
BARBARA HAFER	:	

**EXHIBITS TO  
PLAINTIFFS' ANSWER TO MOTION  
OF DEFENDANT BARBARA HAFER  
FOR SUMMARY JUDGMENT**

William Goldstein, Esquire  
GROEN, LAVESON, GOLDBERG,  
RUBENSTONE & FLAGER  
Suite 200  
Four Greenwood Square  
Bensalem, PA 19020  
(215) 638-9330

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JAMES C. MELO, JR.	:	CIVIL ACTION
v.	:	
BARBARA HAFFER and	:	NO. 89-2935
JAMES J. WEST, ESQUIRE	:	

**DECLARATION OF DONALD BAILEY, ESQUIRE**

I, DONALD BAILEY, ESQUIRE, being duly sworn according to law depose and state:

1. Since January 1987, Mr. West has considered me an enemy. In my capacity as Auditor General of Pennsylvania, I discovered information which raised questions of corruption that implicated if indeed they would not greatly embarrass Richard Thornburgh, present United States Attorney General. Mr. Thornburgh is the former governor of Pennsylvania and a major force in the national republican party. Additionally, these matters clearly implicated Mr. Thornburgh's current chief assistant, Robin Ross. When I brought this information to Mr. West's attention, he reacted angrily and threatened that he would go after me. Mr. West is a republican and, as a republican in the state of Pennsylvania, Mr. West is within the overall ambit of Mr. Thornburgh's political authority. Indeed, Mr. West is a personal protege of Mr. Thornburgh. I believe that Mr. West was trying to protect Mr. Thornburgh by threatening me. The area of corruption involved was the Pennsylvania Department of Transportation and Hubco Ford Truck Sales, Inc.

2. Because of Mr. West's lack of cooperation with regard to my investigation involving the Pennsylvania Department of Transportation and Hubco Ford Truck Sales, Inc., (and others as well) I was forced to file an administrative Writ of Summons and serve it upon Mr. West so that his "cooperation" could be given under mandate of compulsory process. Attached hereto and marked Exhibit "1" is a copy of the Writ of Summons. Mr. West refused to comply with the Writ of Summons and was ultimately successful in refusing to reveal the information I sought to discover *only* because I was defeated for re-election before the

discovery process could be completed. I believe that it was essential to Mr. West, in resisting this corruption probe, that I be defeated and that one of Mr. West's motivations in leaking information to Barbara Hafer during the course of the campaign was to secure my defeat to protect Mr. Thornburgh and Mr. Ross.

3. On October 30, 1987, I personally offered to Mr. West my complete cooperation in his investigation of corruption during the administration of my predecessor, Al Benedict. On November 2, 1987, my chief counsel, James L. McAneny, met with Mr. West and repeated my offer of complete cooperation. In that meeting, Mr. West advised Mr. McAneny that I should *not* suspend or take any adverse personnel action against any employees in my department.

4. The information provided to me by Mr. West in his letter of January 21, 1988 was, in accordance with Mr. West's instructions, kept personal and confidential. Upon reviewing the letter, I was impressed by the fact that except for two names on the list, one of whom had already been completely vindicated by Mr. West (Karol Danowitz); that during his tenure, there had not been (and never has been) any form of investigation of these people. There was absolutely no proof of knowledge by the employees of these alleged payments (if indeed they had ever been made) and therefore it would have been grossly unfair to the employees to publicize the matter or to take any action against them. In addition, I did not trust Mr. West and was unwilling to proceed without an express disclaimer from him because of the admonitions in his letter of January 21, 1988.

5. The only other persons who knew of Mr. West's letter were my counsel, Mr. McAneny, and my chief investigator, Mr. Ficco. Neither I nor Mr. McAneny nor Mr. Ficco disclosed the letter or any portion thereof or its existence to third parties, to anyone else in the Auditor General's office or to anyone in Barbara Hafer's campaign.

6. I was shocked and appalled when Barbara Hafer, on September 8, 1988, publicly revealed to the press that I had received the letter of January 21, 1988 from Mr. West and that the letter contained a list of 20 employees who were allegedly



involved in a job-selling scheme during the Benedict administration. Immediately after Ms. Hafer's public statements, I received numerous telephone calls from reporters and was confronted with Ms. Hafer's public revelation as to Mr. West's letter and its contents, and, I replied as best I could under the circumstances. Ms. Hafer could not have obtained information about the letter or its contents from any source other than Mr. West and she certainly did not obtain information about the letter from me or anyone in my department.

7. I have read Mr. West's "declaration" in which he denies leaking to Ms. Hafer information about the January 21, 1988 letter. I am certain that Mr. West is being dishonest in his declaration and I am sure that Mr. West did in fact he did leak the letter to Ms. Hafer. There is no other source from which Ms. Hafer could have obtained the definitive information she revealed to the press on September 8, 1988.

8. I have been provided with a copy of the transcript of my debate with Ms. Hafer before the League of Women Voters. A copy of that transcript is attached hereto and marked Exhibit "2". The statements made by Ms. Hafer in the debate, with regard to Mr. West's letter of January 21, 1988, demonstrates that Ms. Hafer had specific knowledge of the contents of the letter which she could not have had without having seen the letter. As a person very familiar with this matters I draw the following inferences from statements made by Ms. Hafer in the debate:

a) When Ms. Hafer stated that she had talked to Mr. West about the fact that she would investigate and fire "those people" (the people on the list), this fact and other information available to me makes it clear that Ms. Hafer and Mr. West together created and guided this campaign issue and used the campaign promise of firing the people on Mr. West's list on the dishonest and inaccurate premise that they were "job purchasers" in order to defeat me in the November 1988 election.

b) When Ms. Hafer stated that the 20 names were given to me "at my request", and that she had the transmittal letter, she had to have been referring to the letter of January 21, 1988. The letter of January 21, 1988 was the only letter of transmittal I

received from Mr. West in which these 20 names were specified. There is no other letter on which these names appear.

c) Ms. Hafer stated that Harold Imber's name was on the list. At no time prior to the debate had there been any public disclosure of the names on the list. Mr. Imber's name was in fact on the list and the only way Ms. Hafer could have known that Mr. Imber's name was on the list is if she had seen the letter. By publicly stating in the debate that Mr. Imber's name was on the list, Ms. Hafer conclusively (and inadvertently) demonstrated that she had received a copy of Mr. West's letter of January 21, 1988 and had seen the list.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Date: August 18, 1989

Donald Bailey, Esquire

**COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF THE AUDITOR GENERAL**

TO: James J. West  
Acting United States Attorney  
Middle District of Pennsylvania  
Federal Building  
Harrisburg, Pennsylvania 18501

**WRIT OF SUMMONS**

By virtue of the Authority of Article VIII, Section 10 of the Constitution of Pennsylvania, Section 1602 and Sections 401, et seq., of the Fiscal Code, Act of April 9, 1929, P.L. 343, as amended, you are hereby directed and commanded to appear before the designated representatives of the Auditor General at 224 Finance Building, Harrisburg, Pennsylvania 17120, and at such date and time as shall be arranged therefor, to give testimony and provide such other information as you possess relative to Contract Number 771770-01, awarded June 14, 1984, between the Commonwealth of Pennsylvania, Department of Transportation and Hubco Ford Truck Sales, Inc.

Witness the hand of James L. McAneny, Chief Counsel for Don Bailey, Auditor General of the Commonwealth of Pennsylvania, given under the seal of the Department of the Auditor General this 10th day of December, 1987.

James L. McAneny  
Chief Counsel for  
Don Bailey, Auditor General of the  
Commonwealth of Pennsylvania

**PROOF OF SERVICE**

I certify that I have personally served this WRIT OF SUMMONS, at \_\_\_\_\_, at \_\_\_\_\_ a.m./p.m. this \_\_\_\_\_ day of \_\_\_\_\_ 198 , upon the named respondent or the adult

**The People's Business Debate  
Don Bailey and Barbara Hafer  
Auditor General**

Marilyn Brill: "Hello, I'm Marilyn Brill, President of the League of Women Voters of Pennsylvania. The League is pleased that debating has become an expected part of the election season. We have a proud history of highlighting election issues. Today, we join the PA Public Television Network in sponsoring a debate between the candidates for Auditor General, so that you, the voter, have a better chance to judge the candidates directly and go to the polls better informed. The moderator is Kate Megargee, anchor of the People Business. Kate. . . ."

Kate: Thank you Marilyn Brill. Welcome to our debate between the democratic and republican candidates for the office of Auditor General of Pennsylvania. Those candidates are . . . Don Bailey the incumbent Democrat of Greensburg in Westmoreland County and Republican Barbara Hafer of Elizabeth in Allegheny County. Welcome to you both.

The Auditor General of Pennsylvania is responsible for making sure that the money the State spends is spent in compliance with all laws and regulation regarding the disbursing of state funds. The Auditor General reviews nearly every financial transaction of State Government, with the exception of the legislature and certain commissions and authorities. The Auditor General has the authority to investigate various state departments and can subpoena documents and witnesses. The Department audits state departments, state universities, prisons and welfare recipients, as well as public and private agencies that receive state funding. The Auditor General also audits the Liquor Control Board and its more than 6700 state stores. Joining me on our panel to ask questions of the candidates today are Bill Steinbach, evening news anchor for KDKA Radio in Pittsburgh, and Harry Stoffer from the Harrisburg Bureau of the Pittsburgh Post Gazette.

Prior to the program, a coin toss was held to determine the order in which the candidates would reply to reporters' questions and the order of closing statements. Both candidates have agreed to a set of ground rules established by the League of



Women Voters. Each candidate will have a minute and 30 seconds to reply to a panelist's question and then his or her opponent will have one minute and 15 seconds to respond to the question or for rebuttal. Bill Steinbach, you have the first question for Mrs. Hafer."

Steinbach: "Mrs. Hafer, we're a couple of weeks away from the election now. Throughout the campaign you have made suggestions from time to time that Mr. Bailey has been macing his employees to accumulate campaign funds. Perhaps this close to the election, can you substantiate those charges. Can you nail this down for us?"

Hafer: "Let me just say, Bill, that as an elected official in Allegheny County, I have 8,000 employees. Over the last five years, those employees have contributed to me \$9,000. That comes out to about a buck 16. Don Bailey has over 800 employees, and he has collected over the last few years \$225,000. \$225,000 have come from his employees through their paychecks. He not only maces, he continually asks people, demands of people, to give him money for his own political ambitions. It is documented. It is fact. It is reported on his campaign reports. I think he maces, and a lot of other people think he maces people."

Kate: "Mr. Bailey."

Bailey: "Well, that's simply false. The charges are inaccurate. I would like to comment for the benefit, particularly of our listening audience, that Mrs. Hafer made these charges in Harrisburg. They were made publicly. The results of those charges, which, of course, would constitute wrongdoing if, in fact, they were true, and they are not, were presented to Republican Attorney General Leroy Zimmerman. He dismissed them out of hand as inaccurate and untrue. Individuals who hold office and run for office in Pennsylvania over the years, including Mrs. Hafer, have received help and contributions and we receive voluntary contributions from employees in virtually a number of different offices, including contributions that we have received from various insundre departments, not our own, or office. These are not solicited or forced in any kind of a way. They are voluntary contributions, and her statistics are simply false."

Kate: "Your time for answering that is up. Mr. Stoffer, you have a question then for Mr. Bailey."

Stoffer: "I guess, following that train of thought, with the history in your department under the prior administration of job selling and macing perhaps, why did you not simply make a clean break, especially in light of the fact that such things as macing may not be spoken, but may be implied by innuendoes to employees. Why not just make a clean break and say 'I will accept no contributions from employees of the Auditor General's Department?'"

Bailey: "Harry, if someone wants to make a contribution, and it's a voluntary contribution, there is no reason why those contributions should not be accepted. Mrs. Hafer has done so, she has admitted publicly that she has. Virtually every person in office that I know of has done so, or accepted voluntary contributions."

Those charges, incidentally, that occurred during the prior administration have absolutely nothing to do, and the U.S. Attorney has made it very, very clear, that the, uh, in no way do any of those difficulties touch in any way, and he has publicly stated this, uh, on me. And I am very proud of the fact that we have just turned in an absolutely remarkable job of administration and effectiveness during my tenure. And the difficulty with this campaign, and the very sad part about it, is that a relative and meaningful discussion of substantive issues for the benefit of the public to evaluate a campaign has been. And I think that substantive important issues in the campaign, when they touch on things of important public, should be focused on. The things that you have mentioned were occurred five and six and seven and eight years ago and have absolutely nothing to do, and have never had anything to do with the fine job that we have turned in for the public as Auditor General of the Commonwealth of Pennsylvania."

Kate: "O.K. Mr. Bailey. Thank you. Mrs. Hafer, your response."

Hafer: "Don, that simply is not true and you know it. Let's stick to the facts. The fact is, your Chief Deputy, Harold Imber, is in jail for what . . . racketeering and job selling. Two other people under the Benedict administration are in jail for what . . .



including Al Benedict . . . racketeering and job selling. Your administration, Don, not the previous administration. There are a list of 20 names of people that bought their jobs given to you by Jim West, the U.S. Attorney of the Middle District. He sent me a letter responding to the information that I gathered about people that bought their jobs, that have been maced. He sent it to the FBI. You know the facts and the facts are there is job selling, there is corruption in your office. It is a legacy of incompetence and corruption that you are perpetuating. Your own Chief Deputy that you, that you promoted is in jail and that investigation is continuing."

Kate: "And now, Harry Stoffer has a question for Mrs. Hafer."

Stoffer: "Mrs. Hafer, your opponent has been ridiculed in that past for what I'll call for a lack of a better phrase "Macho politics." Now in this campaign you have urged women to vote for you because you are a woman, and you have urged women to give to your campaign because you are a woman. Aren't sexual politics of any stripe wrong, and how can you defend those sorts of appeals?"

Hafer: "Well I like the word sexual politics; but I think that we are talking about two different things. The act that Pennsylvania has one of the lowest rates of elected women means that women, one, have difficulty in this State. Don has a record of his behavior. I have a record of my, history of my behavior. Women need to support women. It has been said that women don't support women and women don't contribute to women. That is absolutely not true. We have a program geared towards women to help them and encourage them to give financially. But the majority, the truth is that men and women support me, have supported me and elect me. That is a continuing program that I think I will always have. I want to show that women support women."

Kate: "Mr. Bailey, you have a response to that."

Bailey: "Well, I think the responsibility that we all have is to support the best candidate for a particular job. We have, in the Auditor General's Department, equalized pay for women, we have led the way in the Commonwealth of Pennsylvania for work-site day care, and we have done so in a very strong and

aggressive fashion. We have never tried to appeal to a sexist issue or an interpretation of politics or political interpretations of candidate's support in any way. I have been very, very strong in the support of decent and qualified women candidates on a number of occasions and will continue to do so in the future. By the same token, my responsibilities are to a general electorate. We have conducted ourselves in that manner without an idea to be prejudicial either way. And let me conclude with adding that the misinformation and the dishonest information that my opponent referred to just earlier concerning wrongdoing in the Auditor General's office is completely and totally false, and relates to wrongdoing during Al Benedict's administration. She has misled the public. Thank you."

Kate: "Mr. Steinbach, your question now for Mr. Bailey."

Steinbach: "Mr. Bailey, a question of style. Your critics suggest that you grandstand all the time. When you do discover fiscal mismanagement in some governing body or a school district, you call a news conference and make a general announcement. Doesn't the office also carry with it a responsibility to provide some expertise to these people to show them how to get out from under the problems that they are laboring with?"

Bailey: "No, it does not. As a matter of fact, the office is specifically precluded, as a matter of constitutional and professional ethic and standard not to provide pre-audit advice. The functions are post-expenditure. We have a responsibility to find facts, prosecutors and/or other agencies of government have a responsibility then to come in and try to correct those difficulties and problems. If we were to do what you suggest, we could never return to an audited entity and do other than audit ourselves, and that is something that as a professional and governmental standard in auditing, is to be avoided. Audit standards and general standards of government accounting and auditing standards, in fact, defy independence in those cases where you are going to audit yourselves. Your independence would be gone. You, therefore, have a responsibility to take the information and report it to the public. We have a duty and a statutory obligation to do so. That is what we have done. We have touched on controversial matters because they are of interest to the public, because they are of interest to the press,

and we have produced a tremendous work product in that regard. We shall continue maintaining the standards that we have developed and those standards require that we report facts and information to the public and that we are not allowed in any kind of cases, to give pre-audit advice. That is something that we must do as a matter of law."

Kate: "And, Mrs. Hafer, now your response."

Hafer: "Don, you know that is not true. The truth is that two District Attorneys in Jeannette and in Carbon County, your own Westmoreland and Carbon County have said that your audits are riddled with errors and ridiculous. You know that, I know that, the press has reported that. You are a grandstander. You run into town, you hold a news conference. It is the worst kind of politics and the worst kind of behavior for a public official. You know it. It has been documented. It's been said by two District Attorneys in Carbon County School District and also in your own hometown of Westmoreland County. It is unbelievable that you could say that you have, uh, championed on-site day care. You were against on-site day care. You were talked into it by two women in your staff. It's in your report. Read your own report."

Kate: "Bill Steinbach now has a question then for Mrs. Hafer."

Steinbach: "Mrs. Hafer, a degree and a career in nursing, a term as the minority Commissioner of Allegheny County, do you really think that you are ready for a job which, on the surface at least, requires some legal and and fiscal expertise?"

Hafer: "First of all, not only am I a registered nurse, I am a health care professional for 20 years before I was a public official. I have a long history of public service. A long history of working with budgets. A long history of personnel matters. This office of Auditor General needs a professional administrator. I can hire a lawyer. I might hire Don. On the other hand, we need an administrator in that office. We have a legacy of incompetence. Twelve years of people, uh, uh, crime and corruption. Twelve years of corruption ineptness in that office. We have 20 people named by the U.S. Attorney as having brought their jobs. He has done nothing about it. That list was given to him by his request. He's done nothing about it. And he's a lawyer. We

need someone that knows how to practice professionally, high standards, integrity. And with a history as a County Commissioner in the second largest county in the Commonwealth, I have a budget of \$440,000,000,000 and 8,000 employees. I am not only qualified, the Press and Post Gazette and the Tribune Review have said that I am the best qualified."

Kate: "Mr. Bailey."

Bailey: "Well, I think that maybe the best evidence is the kind of job performance that you have turned in as a Commissioner. Thelma Shroeder was an appointee of yours out there at the prison, the jail. You are chairman of the Prison Board. Two people are dead today, while you were running around the state campaigning for Lt. Governor. Law suits were filed in May. What responsibility did you perform. Apparently none. Now let's go back to Jeannette. That was not an audit. That was information that we gave to investigators. And it's no secret that I opposed Mr. Driscoll for incompetence and for not doing his job when he ran for District Attorney. But even he admitted publicly that close to \$3,000 in hot dogs, or missing food or money was gone. Money representing 20 to 30 percent of the profits of a school activity fund. I think that's wrong. Your references to Carbon County are just plainly and simply totally false, baseless and without foundation and fact."

Kate: "Harry Stoffer you have your question for Mr. Bailey."

Stoffer: "Mr. Bailey, last week you disclosed the results of your investigation into the 20 names that had been given to you by the U.S. they were referred. And all of that information that we requested and that we helped with and that we investigated on our own initiative, we weren't asked, we weren't challenged, we did it because we believed it was the right and proper thing to do, is five and six and seven and eight years old. And the majority of those people, these notes and names that were gleamed from reports, none of those people had been investigated, there was no attempt to charge them in wrongdoing, they were names that needed to be checked out. And you know, we need to respect people's rights and we need to conduct ourselves in accordance with responsibility. We were prompt, we were thorough, we were complete and very decent and open



and nonpolitical about it and that's what we are going to continue to do."

Kate: "O.K. Mrs. Hafer."

Hafer: "Don, that is simply not true. The truth really isn't in you. Those 20 names were given to you by Jim West at your request. I have the letter, the transmittal letter. I talked to Mr. West last week. He said not only did he give you the information, he gave you specific instructions to proceed with the investigation and punish those people as you saw fit. You were the only one who has the names that can release them. You are absolutely right, the FBI won't release those names. You are the ones that should release those names. You are the ones that wanted the list. You were given the list in January and again instructed in July to clean house. Nine months is not timely. It is a continuation of those, uh, the corruption of the previous administration. You not only, those people bought their jobs, you make them keep paying."

Kate: "O.K. Mrs. Hafer and Mr. Bailey, I am going to exercise my moderators' prerogative now to ask a few questions in the time remaining. You will each have a minute and 15 seconds to respond to these questions and I will direct my first question to Mrs. Hafer."

Following up on what you just said, if you were elected Auditor General, what would you do to, uh, remove that some people see as a remaining cloud over the Department, considering the fact that it's known that there are these 20 people?"

Hafer: Well, one of those people are now in jail, Harold Imbere, uh, on that list. But let me just tell you what I would do, and I would talk, and I have already talked with the U.S. Attorney's office, you said that you couldn't do anything about two of them because they had been ordered reinstated by an arbitrator. I understand that in another case you have appealed an arbitrator's decision to the state Supreme Court over an employee who put in for \$14 too much in expense reimbursement. Uh, don't you have a case of misplaced priorities here, and does this second case not smack of some vindictiveness against an employee who came up with some audit results you didn't like?"

Bailey: "No it does not, Harry. First of all, I don't have the authority to appeal an arbitrators' decision that's years old. I can't do it. So the premise of your question is simply incorrect. Secondly, the reason that we, in fact, are appealing the other case is because it is something that occurred during my administration and we are bound and determined to see that the law is enforced. There is no inconsistency at all. I am powerless in the first two cases. And incidentally, on those 20 names, isn't it time to be honest with the public. The press core, myself, even my opponent honestly knows that the U.S. Attorney has said that I cannot in, there is no way that I can reveal those names. He can't reveal them. I can't reveal those names. He knew that when about this, when I am Auditor General I will investigate and fire those people. There will be no job selling, no corruption and no macing in Hafer's administration. It is unbelievable that in Pennsylvania that we have a history of macing and job selling. That went out years ago, years ago. Yet we have a fellow that is supposed to be of the highest standard, and his predecessor, his colleague, they had joint fundraisers together in '84 continuing, we have Don Bailey continuing the corrupt practices of the last administration, He and Al Benedict are cut out of the same bolt of cloth. There is corruption in that office. I am going to investigate and I am going to fire those people."

Kate: "Mr. Bailey."

Bailey: "Yeah, first of all, what Barbara has said is totally and completely false. Now we have set up an entire new standard of ethics in the office, we wrote that into the office when I came into the office. The information that she is talking about are charges made against people, some of them unjustified, incidentally, that were, goes back five and six and seven years ago. Barbara has just made my day. The fact that she has discussed these issues with the U.S. Attorney itself raises a number of serious questions. She is also incorrect in that the U.S. Attorney does have the freedom, if he would like, to certainly, to release those names. In fact, he has commented to the press that he can do so. One must wonder why, if those two were talking and/or working together, why this list was ever floated to the press to begin with. When we did check these people out, we found that half of these people had absolutely no



knowledge of these matters. That information was made to the U.S. Attorney. We discipline people in the office. We enforce the law. We are going to continue to enforce the law. We will do it fairly and justly. Unfortunately, or fortunately, depending upon your point of view, there is absolutely no legal action which I can take against these people. If that is used in a dishonest way by a political opponent to create suspicion or falsehood, that's too bad. My self-respect requires that I tell the truth and I have."

Kate: "Thank you Mr. Bailey. We have now reached the end of our question and answer period. I want to thank Bill Steinbach of KDKA Radio and Harry Stoffer of the Pittsburgh Post Gazette, for joining us on our panel today. Now it's time for closing statements. You will have a minute and a half, and the coin toss determined that Mr. Bailey would speak first."

Bailey: "Thank you very much. To the voters of the Commonwealth of Pennsylvania, I would ask that you consider and look at the remarkable record that my administration has turned in in your service. We have boosted productivity remarkably. In-house education, work-site day care for employees in our office that they pay for that has led the way as a striking example of what positive administration can do. We have gained national recognition in helping Pennsylvania earn a certificate of merit for financial reporting. We have fostered, and I have led the way, with an intergovernmental committee, appointment with the National Association of State Auditors, that for the first time will produce coordinated audits of use to the legislature and of use to the press that will be able to inform the public of what's really going on with accountability. As to the charges that my opponent has raised, I hope that you have, and I know that you do, the judgment to prevail and to think in cases like this that those that cannot run a positive campaign, and distort or misuse information from the past to try to dismerge political opponents, hide the deeds an advocate, not a advisory. I hope that you see that I am the person to do the job. Thank you."

Kate: That concludes our debate between the democratic and republican candidates for Pennsylvania Auditor General. I would like to thank Mrs. Hafer and Mr. Bailey for being with us today."

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JAMES C. MELO, JR. : CIVIL ACTION  
:  
v. :  
:  
BARBARA HAFFER and :  
JAMES J. WEST, ESQUIRE : NO. 89-2935

**DECLARATION OF DONALD BAILEY, ESQUIRE**

I, DONALD BAILEY, ESQUIRE, being duly sworn according to law depose and state:

1. I served as Auditor General of Pennsylvania from February 1985 to February 1989. My predecessor was Al Benedict and my successor was Barbara Hafer.

2. When I began my term of office in February of 1985, I determined that there was a then-existing policy within the Auditor General's department that non-union employees would not be dismissed except for just cause (misconduct or poor job performance) and that the just cause provisions in the collective bargaining agreement were applied equally to non-union employees through the Policies and Procedures Manual. In fact, I was even advised by my counsel, James McAneny, who had been counsel to the Auditor General during the Benedict administration, that I was legally required to fire only for cause and that this legal requirement applied to both union and non-union employees.

3. During my four year term in office, I never fired a union or non-union employee except for just cause. It was the official policy of the Auditor General's Office during my term of office that no employee, union or non-union, would be fired except for cause.

4. I consulted with my personnel director during my term of office with regard to the policy that no employee would be fired except for just cause and through my personnel director, it

became common knowledge within the Auditor General's Department that no employee, union or non-union, would be fired except for just cause.

5. Based upon what I learned when I took office, in consulting with my counsel and reviewing department records, I can state with reasonable certainty that during the Benedict administration, it was also the official policy of the Auditor General's Office that no employee, union or non-union, would be fired except for just cause. The provisions in the union contract and the employment manual which provided that no employee would be fired except for just cause were consistently interpreted during the Benedict administration and my administration to mean exactly what they said and this fact was common knowledge with the Auditor General's department. Mr. Benedict served for two terms (eight years) and therefore, to my knowledge, the policy of not firing except for just cause was the official policy of the Auditor General of Pennsylvania for at least twelve years preceding February 1989.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATE: August 30, 1989

  
DONALD BAILEY, ESQUIRE

To Whom It May Concern

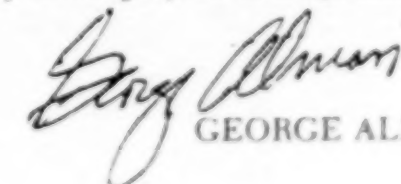
I George Almasi served under Don Bailey Auditor General of Pa. as Director of Personnel and Labor Relation from Jan. 1985 thru Jan. 1989.

It was the policy of the Dept. of the Auditor General that the Policy and Procedure Manuel was issued to every employee (Date of Hire New Employees) union protected as well as management. The Policy and Procedure Manuel followed the Labor Agreement as not to cause a controversy on legality. This afforded management personnel the same rights afforded to union protected employees.

All dicipline issued was by the Personnel Director after discussion with the Auditor General and Chief Consul. Disipline was then issued according to the degree of the offense but also in this order

1. Oral warning
2. Written warning
3. Suspension
4. Termination

All disipline was discussed with the employee-union rep-rep from Auditor Gen personnel — Chief Consul and Personnel Director present in case of management personnel the union rep. was not called. In my tenure as Personnel Director no one was dismissed without just cause. This was the same procedure followed by the previous administration. In fact the previous administration placed a fee on the manuel if it were not returned according to a record number kept by personnel. I re-wrote the manuel as the Labor Agreement changed and also include a code of ethics and travel policy which was also changed by Labor Agreement. Before the new manuel was issued to all employees of the Auditor General's Dept. It was approved by Chief Consul Labor Dist. Rep. Office of Administration. This policy manuel was to be followed by all employees management and labor.

  
GEORGE ALMASI

PENNSYLVANIA STATE SENATE COMMITTEE  
ON APPROPRIATIONS  
BUDGET HEARING  
AUDITOR GENERAL

TRANSCRIPT OF PROCEEDINGS

BEFORE: SENATOR RICHARD A. TILGHMAN, CHAIRMAN  
SENATOR RAPHAEL J. MUSTO  
SENATOR SENATOR J. BARRY STOUT  
SENATOR VINCENT J. FUMO  
SENATOR M. JOSEPH ROCKS

DATE: MARCH 9, 1989, 2:00 P.M.

PLACE: SENATE MAJORITY CAUCUS ROOM  
STATE CAPITOL BUILDING  
HARRISBURG, PENNSYLVANIA

PRESENT:

GENERAL BARBARA HAHER  
JOHN TSUCHALAS  
DENNIS MOODY

SHERRY BOWES, REPORTER  
NOTARY PUBLIC

a hundred dollars.

GENERAL HAHER: Well, if they're reported, that would be legitimate. We did not match up — if you're —

CHAIRMAN TILGHMAN: Excuse me a minute. May I interrupt, and it has nothing to do with the hearing. I have a group of students and I have to leave for a minute to have a picture taken and I'll turn the chair over to Senator Rocks, and then you can continue.

I would also say that I'm not a lawyer and you've been through this ten times, but I certainly don't want to get into matters of litigation. I know Senator Fumo is on one side of it and you're on the other, but just —

SENATOR FUMO: No, I'm not trying to litigate here, Mr. Chairman.

CHAIRMAN TILGHMAN: — use your good judgment. —

SENATOR FUMO: I'm not trying to litigate the case here, Mr. Chairman.

With regard to an additional 30-some employees, I believe, that you also dismissed, I believe your press secretary — I assume he speaks for you — Mr. or is it Mrs. or Ms., I don't know if it's a woman, Morse, M-o-r-s-e, is that Mr. Morse?

GENERAL HAHER: Chuck Morse is here, press secretary.

SENATOR FUMO: Excuse me?

GENERAL HAHER: Chuck Morse is here.

SENATOR FUMO: Okay. I assume he speaks for you. I have some various — copies of some various newspaper stories in which he is quoted. The first one I have here is from the Patriot, where he's quoted, and this is of the 30, not of the 18.

GENERAL HAHER: Twenty-nine.

SENATOR FUMO: Twenty-nine, whatever it was. He said, "There is no doubt that if you look down at the list, they were people active in former Auditor General Don Bailey's campaign." He's further quoted as saying, "Most were competent employees who were let go." That was on February 22nd, 1989.

There's another one in the Post Gazette that says at least one of them was a Republican, I'm glad to see that. Another one, another article in which the 30 — "All 30 fired Tuesday were partisan holdovers from the Democratic administration, said the



auditor's spokesperson, Charles Morse. The fires are typical of any change of party rule, Morse said, adding that there could be more changes."

I wonder how much political consideration

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

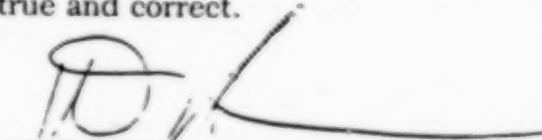
JAMES C. MELO, JR., et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
BARBARA HAFFER and	:	
JAMES J. WEST, ESQUIRE	:	NO. 89-2935

**DECLARATION OF WILLIAM GOLDSTEIN, ESQUIRE**

I, WILLIAM GOLDSTEIN, ESQUIRE, being duly sworn according to law depose and state that with regard to both the Melo plaintiffs and the Gurley plaintiffs, no claim for damages has ever been made against the Commonwealth of Pennsylvania and all claims for damages have been made against Barbara Hafer individually and in her individual capacity. Service of the Complaint was made upon Barbara Hafer and no service was attempted upon any other Commonwealth agency or the Pennsylvania Attorney General's Office. No money has been sought and no claim has been made for monetary damages to be paid out of the Commonwealth's treasury.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATE: 8/31/89

  
WILLIAM GOLDSTEIN, ESQUIRE

JA-198

but that was the way in which we went.

Q. Okay. Okay, but essentially, you're saying any -- any affidavits you would have prepared would have been completed by September of '87?

A. Well, if not September, shortly thereafter.

Q. Now, with regards to Ms. Danowitz, do you have any reason to believe that Ms. Danowitz knew that this job was allegedly purchased for her?

A. Well, until I walked in here today I don't ever remember seeing Mrs. Danowitz in my life, so I don't know her. So I don't know whether she would or she wouldn't. I have no knowledge whatsoever, on not even hearsay. It's not a subject that I discussed with Mr. Theurer, that I discussed with Mr. Danowitz whenever I would have conversations with him. I just wouldn't know.

Q. You just took the alleged money?

A. Well, yea, exactly. I never -- with any of these people, I never had any conversations, because it didn't matter whether they knew or whether they didn't.

Q. What did you do with all the money?

A. What did I do with the money? I used it for political purposes for Al Benedicts campaigns for just -- quite a variety of things. At the time that the -- that that money came about, we were in the Pennsylvania Democratic State Committee, and we needed about a quarter

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Commonwealth of Pennsylvania  
Office of the Auditor General  
Harrisburg 17120

DON BAILEY  
AUDITOR GENERAL

224 Finance Building  
Harrisburg, PA 17120

October 18, 1988

Honorable James J. West  
Acting United States Attorney  
Middle District of Pennsylvania  
Federal Building  
Harrisburg, Pennsylvania 17108

Dear Mr. West:

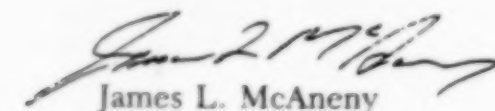
Please find enclosed a copy of the internal investigative report which was delivered to the Auditor General yesterday.

Upon your review of the enclosure, I would be pleased to provide any of the supporting documents referred to in the report, or to receive any evidence which has not previously been provided to us which may contradict any of the findings that we reached.

I would also appreciate an opportunity to discuss the situation involving Mr. Guido Alesi. Because he was not named by you in the list of employees that we have permission to take action against, and with the knowledge that he was recently called to testify before the grand jury, we are reluctant to proceed without assurances that any act or statement on our part would not impair your investigation into whatever matters occasioned your decision to examine him.

After you have completed your review of our report, please contact me at your convenience concerning the matters addressed in this letter.

Very truly yours,

  
James L. McAneny

Enclosure

**COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF THE AUDITOR GENERAL**

**SUBJECT:** Job Selling Investigation

**To:** Honorable Don Bailey  
Auditor General

**FROM:** James L. McAneny, Chief Counsel

**DATE:** October 17, 1988

This is a final report of the findings with regard to the investigation of the various allegations received from the United States Attorney's office concerning job selling under the Benedict administration, and conducted by myself and Nick J. Ficco, Jr., Director of the Bureau of Investigations. Copies of the documents referred to in this memorandum are attached for your convenience.

**HISTORICAL BACKGROUND**

On January 14, 1988, Acting United States Attorney James J. West conducted a press conference to announce the formal indictment of Alfred P. Benedict, the former Auditor General, during which he stated that there were still fourteen current employees of the department who bought their jobs under the Benedict administration. We were not previously informed of any such allegation, and only learned of Mr. West's statements as a result of subsequent media inquiries.

On January 15, 1988, I wrote to Mr. West objecting to his remarks without any notice to us and requesting information as to the identifies of the employees in question.

On January 21, 1988, Mr. West wrote to you with a list of 21 employees. This letter further noted that at least 7 of these employees had been identified in the previous prosecution of John Kerr, that only two of the named employees were believed to have directly made payment to Benedict or Kerr and that the remainder may not have known that their jobs had been purchased for them by others, and that the FBI investigation indicated that one person certainly did not know of the payment. The letter further requested "... that you keep these names

strictly confidential, not to use them for any type of media disclosures other than necessary to appropriate administrative proceedings, and make them available only to your most trusted employees on a need-to-know basis," and even enclosed copies of two federal court opinions addressing the ethical standards for identifying unindicted co-conspirators which "we all should follow."

On January 22, 1988, you wrote to Mr. West advising him that we saw no way to undertake an administrative investigation without endangering the confidentiality which Mr. West desired, and informing him that we would refrain from action until he advised us that the risk of disclosure would not jeopardize his investigation. No response was received for five months.

On June 21, 1988, Mr. West wrote to you to advise that we could now proceed with our investigation.

On June 27, 1988, I spoke to Mr. West by telephone to request any specific information that could be made available to assist our investigation, since no details of the allegations had yet been made known to us. Mr. West told me that he could provide excerpts from Kerr's statements to the FBI, but not grand jury testimony. He also advised me that he had "profound" statute of limitations problems with the three job selling intermediaries referred to, but not named, in his letter of January 21, and that he might be able to identify them and provide details of their actions to us. I also informed him that two of the persons named in the January letter (Favasuli and Larkin) had been fired under the Benedict administration, took their dismissals to grievance arbitration, and won reinstatement. When Mr. West expressed some concern that this might have been as a result of some deal that Benedict made to lose the case, I informed him that the department had been represented by the Office of Legal Counsel, Office of Administration, under Governor Thornburgh's administration, which Mr. West stated that he had not known. Mr. West advised me that he should have everything ready for us by the next afternoon.

On June 29, 1988, I called Mr. West because I had not heard from him. He told me that the detailed information would



probably not be ready until Tuesday, July 5, 1988, after the holiday weekend. However, the information was not made available then.

On July 12, 1988, Mr. West finally sent, by overnight express, a revised list of 21 employees which deleted the names of Harold Imber and Karol Danowitz and added Michael Schubert and Jean Mills, together with FBI memoranda summarizing various statements made by John Kerr and a letter from Supervisory Senior Resident Agent David Malarney to Mr. West that asserts a continued concern for discretion and the personal safety of John Kerr.

After receipt of these documents, I began a review of personnel and investigative records of the named individuals, as well as four more individuals identified in the documents provided but not named in the letters from Mr. West. The fact that many of the records were taken by the State Attorney General during the original Kerr investigation, and have not yet been returned, hampered this aspect of our review somewhat. However, I did notice certain matters which might allow a way for Mr. West to circumvent his problems with the federal statute of limitations.

On August 10, 1988, I wrote a letter to Mr. West enclosing a copy of my analysis of the applicability of the Pennsylvania extended statute of limitations relating to crimes committed by public employees during the course of their employment. The letter advised Mr. West that we were relying upon his prior representations that the State Attorney General had been fully apprised of the case in continuing with our administrative investigation of the allegations.

On August 18, 1988, employee Guido Alesi was interviewed in your office by yourself, me and Nick Ficco. No formal record of the interview was made because of Mr. Alesi's desire to consult with legal counsel, yet he did answer all questions presented to him. I have documented that interview from my own notes with a memorandum to the file.

## INVESTIGATIVE FINDINGS

Beginning on September 16, 1988, Mr. Ficco and I conducted recorded interviews of each of the employees named in Mr. West's lists or otherwise identified in the information provided to us, except Favasuli and Larkin who had been reinstated by arbitration award dated July 17, 1984, and Jean Mills who resigned on August 15, 1986. No one refused to testify, or asserted the right to have counsel present (although all were advised of this right). The statements were obtained on the following dates:

09/16/88	Michael Schubert
09/19/88	Patrick Coyle
	James Police
09/20/88	Lucille Russell
	Robert Russell
09/21/88	Guido Alesi
09/22/88	Thomas Anderson
	James Melo
	Walter Speelman
	Rodney Weist
10/03/88	Gary Beswick
	James DiCosimo
	Beverly Esterman
	David Pantano
	Donald Ruggerio
	James Walsh
	Markos Xenakis
	Frank Zatta
10/06/88	Mitchell Carr
	Karol Danowitz
	John Weikel
10/07/88	Richard Walton
10/14/88	Louise Jurik

To arrive at useful numbers for purposes of the remainder of this report, I shall refer to 22 names listed by the U.S. Attorney (the 21 named in Mr. West's letter of July 12, plus Karol Danowitz who was dropped from the January list. There is no reason to include Harold Imber in the listing, although he was named in January, since is now in prison for his involvement). Of the 22 named employees, our finding are as follows:

One person, Jean Mills, resigned on August 15, 1986, and should not have been listed as a current employee. Obviously, we are unable to take any action against her.

Two employees, Francis Favasuli and J. Michael Larkin, had been named in Kerr's indictment and discharged from employment on November 17, 1983. However, their dismissal was reversed and changed to a thirty day suspension by grievance arbitration award entered July 17, 1984, and they were ordered to be reinstated with back pay from December 17, 1983. An appeal was initially filed to the Commonwealth Court, but that appeal was withdrawn in return for the union's written agreement that the award could not be used as precedent in any future cases.

Of the remaining 19 named employees, the information concerning ten of them indicates that others (parents, spouses, parents-in-law) paid to obtain their jobs. In the case of one, Karol Danowitz, even the federal authorities have stated in writing that she did not know that any bribe was paid to get her job (see Mr. West's letter of January 21, 1988). She is also the only one of the named employees who was interviewed by the U.S. Attorney's office or F.B.I. The rest have, likewise, denied paying for their positions and have denied any knowledge that anyone else paid a bribe on their behalf. Only two, Thomas Anderson and James Melo, had not been previously questioned by the Attorney General. Lucille Russell's husband, Robert Russell, who is a FA IV in the Bureau of Municipal Pension Audits (also known as Police and Fire Audits), and who was identified in the information provided by the federal government as paying for his wife's job although he is not on the list of named employees, even took a polygraph test at the request of the Attorney General's Office during the Kerr investigation and passed, as did Beverly Esterman. We can see no basis upon which to initiate any action, therefore, against these employees:

Thomas Anderson	Mitchell Carr
Karol Danowitz	Beverly Esterman
James Melo	Lucille Russell
Walter Speelman	James Walsh
John Weikel	Rodney Weist

In further support of this conclusion we note the existence of a number of factual errors contained in the information submitted by the federal authorities.

Mr. Anderson is alleged to have been hired as a FA I on June 4, 1979, at an annual salary of \$12,499, after his father paid Kerr \$3,000. However, Thomas Anderson was employed as a Temporary Administrative Assistant I on June 4, 1979, and resigned on August 24, 1979 to return to school. On December 19, 1979, he was reemployed as a temporary Administrative Assistant, converted to a wage employee on January 28, 1980, and not finally employed as a Field Auditor I until July 28, 1980, after he had received his bachelor's degree in accounting.

"Reds" Barbone, identified as the father-in-law of James C. Melo, Jr., in the supplied information, is not Mr. Melo's father-in-law. He is the husband of Mr. Melo's sister-in-law.

While such discrepancies may appear to be insubstantial on their face, they are highly relevant in determining the credibility of the allegations made by John Kerr and transmitted to us by the federal authorities, under the legal axiom of *falsus in uno, falsus in omnibus*. The successful passage of lie detector tests by Mr. Russell and Mrs. Esterman provide additional support to the applicability of that principle.

The eight of the remaining named employees are alleged to have made payment directly for their jobs or promotions. They are:

Gary Beswick	Patrick Coyne
James DiCosimo	Louise Jurik
David Pantano	Donald Ruggerio
Markow Xenakis	Frank Zatta

None of these people admitted to paying for their positions and we were unable to discover any other information which would corroborate the allegations made against them. Mr. Coyne's appointment had the backing of the Steelworkers union, and could likely constitute a political favor. Mr. Beswick's aunt and uncle exert substantial political influence in the Pittsburgh area. Mrs. Jurik's file discloses commendations for her audit work shortly before her promotion to FA III. Mr. DiCosimo was a former three-term Huntingdon County Commissioner and State Committee Executive Board member with substantial influence of his own, plus having bump-back rights to his former position with the A&P Company. Mr. Zatta was an



accounting graduate originally hired during Mr. Casey's administration as part of the effort to recruit accountants. Mr. Ruggerio attended Mr. Benedict's inauguration, but the \$1,000 paid at that time constituted the price of tickets for four people at \$250 each. Of this group, only Mr. Coyne was not interviewed by the state Attorney General during the Kerr investigation. There being no other information available, we are unable to substantiate any of the allegations concerning these eight people.

The remaining individual on the list of 22, Michael Schubert, is alleged to have served as a go-between or intermediary between John Kerr and Messrs. Coyne and Police. James Police was not named in the list, being identified by the federal authorities as a former employee of the department. As he is not, we interviewed him as well. Mr. Police, Mr. Schubert, and Mr. Coyne, all denied the allegations and no evidence was discovered to dispute their denials.

Besides Mr. Police and Mr. Russell, we were able to identify other department employees accused of wrongdoing by the federal authorities but not named in Mr. West's list. They are Guido Alesi and Richard Walton.

Mr. Walton admitted delivering \$1,000 to Mr. Benedict's 1977 inauguration, but in return for four tickets (for himself, Donald Ruggerio, Rick McGargle, and Cheryl Brobst), not in return for Mr. Ruggerio's subsequent employment as alleged. It should be noted that the law at that time did not limit cash contributions, require the identification of the donor, or otherwise make such a purchase of dinner tickets illegal. Mr. Walton was never interviewed by the Attorney General, U.S. Attorney, or either grand jury, despite the fact that the state authorities had investigated Mr. Ruggerio during the Kerr investigation.

Mr. Alesi admitted delivering cash to John Kerr in excess of the lawful amounts, but stated that he was unaware of the legal requirements and relied upon Kerr, as a lawyer, for legal guidance. He denied ever delivering money to help anyone get a job or promotion, and denied ever macing anyone. Mr. Alesi has also been questioned by both state and federal officers and grand juries, most recently on August 23, 1988, when he appeared before the federal grand jury. In his statements to us, Mr. Alesi was very open and candid about his political and

fundraising activities during the Benedict administration, which lends substantial credence to his averment that he was completely honest with both the state and federal grand juries. Nevertheless, he was never charged by the state and asserts that the U.S. Attorney has assured him that he is not a target of their investigation. He adamantly denies that any money was involved in his efforts to obtain jobs for James DiCosimo and Jean Mills, a denial that is reinforced by the political influence possessed by Mr. DiCosimo and Mrs. Mills in their own right as well as by the relationship which Mr. Alesi apparently had with Mr. Benedict and John Kerr. Solely on the basis of his cash deliveries to Kerr, however, disciplinary action might be sustainable by relying upon the legal principle that ignorance of the law is no excuse. In labor arbitrations, such legalistic positions are not always looked upon with favor, but since Mr. Alesi is a management employee he is susceptible to summary discharge without cause. While such an action may not be fair, it is, at least, within your legal power. Because of the publicity surrounding the "list of employees," however, I suggest extreme caution in the handling of any of Mr. Alesi's case, since a real possibility exists that he could successfully prosecute a wrongful discharge action if a jury believed that your action was based upon political considerations in light of the pending election, rather than as punishment for actual misconduct.

I would also call your attention to the fact that is not named in Mr. West's lists, and that a substantial question exists, therefore, that the limited use of the confidential materials provided would not extend to disclosure of his name, even as necessary to take administrative action. I would suggest that we continue to investigate the allegations concerning research the applicable case law, and obtain Mr. West's assurance that disclosure in his case would not impede whatever federal investigation occasioned his grand jury appearance in August.



## SUMMARY

Of the 22 people listed by Mr. West in his letters, none of them have been proven to be guilty of the allegations. One resigned almost 2 years before first being named in Mr. West's letter of July 12, 1988. Two were discharged by Benedict, but reinstated by an arbitrator. Ten were, at worst, the unknowing and therefore innocent beneficiaries of bribes paid by family members. And no evidence can be found to substantiate the allegations concerning the nine employees claimed to have acted with knowledge.

Of the four people not named in the lists, but otherwise identified in the information provided in July, insufficient information is available to substantiate the allegations against three of them. The allegations concerning having been partly verified by his own admission, should be further examined and the law researched regarding the tort of wrongful discharge to determine if action should be initiated against him. In his case, we should also obtain the assurance of Mr. West that any action would not hinder the federal investigation for which he was called before the grand jury.

Max Weiner

. . . from Consumer Party

SOURCE: by STEPHEN DRACHLER, The Morning Call

DATELINE: HARRISBURG

AUDITOR GENERAL RACE HARSH  
AL BENEDICT'S NAME REMAINS AT CENTER OF DEBATE  
ELECTION 88

Al Benedict left office nearly four years ago, but his legacy as Pennsylvania's auditor general is the biggest issue in the re-election campaign of his successor.

Benedict's current address is a one-time monastery that is now a low-security federal prison near Johnstown. He's serving a six-year sentence for his role in a massive job selling scheme that also landed two of his former deputies in prison.

The scandal has provided ammunition to Allegheny County Commissioner Barbara Hafer, a Republican who is running a slashing, hard-nosed campaign against Benedict's successor, former Democratic congressman Don Bailey.

For his part, Bailey is running a low-key campaign, giving speeches to veterans groups and labor unions and attending political fund-raising functions across the state. He says he's achieved a "remarkable record" of accomplishment while serving as the taxpayers' fiscal watchdog.

While prosecutors have clearly said Bailey was not involved in the scandal, Hafer has loaded her verbal gun with phrases linking Bailey and Benedict and has run from press conference to press conference across the state, claiming that Bailey's administration is rife with corruption.

One of the bullets is the fact that Harold Imber, now jailed for selling jobs while working for Benedict, stayed on and was one of Bailey's top aides until he was indicted and pleaded guilty early this year.

Although none of the crimes Imber went to jail for were committed while Bailey was in office, Hafer contends, without offering any clear substantiation, that the job-selling that flourished under Benedict continued when Bailey took office.

Bailey has denied all of Hafer's allegations, including one that he has protected 20 employees who have remained on the payroll since buying their jobs during Benedict's reign. He decries Hafer for running a dirty campaign, and says she has been shooting blanks, but admits her confrontational tactics have hurt him.

A key element of Hafer's strategy is to control the campaign's agenda.

Much as George Bush has maintained a firm grip on the national perception of Michael Dukakis in this year's presidential campaign, Hafer has attempted to control the public view of Bailey.

It is a difficult task, challenging an incumbent in a statewide campaign for an office that competes every day for attention with the presidential candidates and a bevy of candidates seeking other offices from state senator to U.S. senator.

She's in Scranton on this gray, windy day, holding another news conference in the converted motel room that serves as the Lackawanna County Republican Committee's headquarters.

The subject: job selling. Again.

"Cleaning up that office, dispelling the cloud of suspicion that has hovered over its solid civil servants for more than five years, and restoring the credibility of that office . . . will be the prime objective of the Hafer administration," the 45-year-old candidate says as two local newspaper reporters watch her read a prepared statement in front of a single television camera.

The news conference was called to respond to Bailey's announcement earlier that week that he was taking no action against 28 people who Hafer claims either bought their jobs or were the benefactors of a bribe by someone else. Bailey said he couldn't take action against the workers without evidence. An internal investigation found none, he said.

"What was the depth of that investigation?" Hafer asks. "Well, his people talked to the individuals . . . and all them denied doing anything wrong."

Hafer skirts around the issue when asked if the 28 workers had a right not to be publicly named if there were no charges being filed against them. She says U.S. Attorney James West, who prosecuted Benedict and Imber, told her he would have not

given the names to Bailey if the people were not guilty. They weren't prosecuted, she says, because the federal probe was aimed at the sellers, not the purchasers of jobs.

"One of the 21 (who bought jobs) is Harold Imber who is now in jail," Hafer says as she adjusts her green-rimmed glasses. "There are 28 others. If the one that is in jail is on that list, what are we to expect of the 28 others . . . Bailey did nothing."

Hafer tells the reporters that she'd implement a code of conduct, replace incompetent workers and fire anyone who she thinks is tainted by the job-selling scandal. She would implement a 12-point program aimed at changing the image of the auditor general's office and improving its relationship with the governmental entities that it reviews.

There are snow flurries in the air at Seven Springs. There always are here at the end of October. The ski slopes of the western Pennsylvania resort will soon be clogged with brightly clad skiers.

But tonight the hotel and lodge is partially filled with young people attending a McDonald's restaurants convention and a group of middle-aged men and women who belong to the union representing State Store managers.

The Independent State Store Union has endorsed Bailey's re-election. His Harrisburg office lists the speech as a campaign event. Bailey stands before the group after its banquet, extolling the state-run liquor system and urging the workers to keep fighting to maintain it. After about 29 minutes, the speech ends. Bailey gets another standing ovation. He never mentions that he's running for re-election.

Afterwards, the 43-year-old Bailey stands in the hall talking with two reporters. He bristles when one suggests he's running a low-key campaign. Earlier in the day he had met Hafer in a Pittsburgh television studio to tape their only debate of the campaign.

"I don't agree with that . . . I do a tremendous amount of weekend and late-in-the-day traveling," Bailey says. "We do seminars. I have got veterans groups all over the state. Their support is universal. I have spoken to (Fraternal Order of Police)



groups on a number of occasions . . . To me, that's not low-key. That's a lot of hard, grassroots work."

Few interviews with Bailey are quick. And when the conversation turns to Hafer's attacks and accusations that his department is corrupt, his voice rises as he responds. Five minutes quickly turns to 10, then 15 and then 28.

"I have the same answer I had a few weeks ago. It's totally false. It's dishonest. It's inaccurate. The press corps knows it. Republican Attorney General LeRoy Zimmerman has dismissed these things out of hand," Bailey says.

"I think that it is a little sad . . . that we keep rehashing what was clearly known and well-known to be false," he adds. "There is absolutely nothing that has ever occurred during my administration that is wrong . . . I am sure you, as a reporter, see the lack of substance. It has all been XXXX and dirty."

The second part of her plan, which has been agreed upon by several well-known accounting firms, entails using "loaned executives" from the companies, which would provide accountants at no cost to the taxpayers. The accountants would meet with county, municipal and school district officials "to work on specific problems . . . in a non-political, non-threatening business way."

Hafer, who was visiting the area for the third time since her campaign to unseat Bailey began, said as part of her program to revamp the office, she would initiate a training program for municipal officials and others "so they know what to expect from the audits."

A registered nurse with 28 years of experience in health care and administration, said she also plans to establish an internship program for the auditor general's office for college students who plan to enter the field of finance.

Others plans she hopes to establish in effort to "clean up" the office and make it run more efficiently include:

- Establishment of "problem response team" which would provide immediate, short-term assistance and guidance for public agencies experiencing fiscal management problems.

- Establishment and enforcement of a "Code of Conduct" for office employees.

- Working with the state attorney general to initiate action against employees who she says participated in job selling or other illegal activities during Al Benedict's administration.

- Stopping on-site political activity. Hafer claims Bailey has raised more than \$200,000 through the solicitation of employees of the office.

- Conducting audits in a fair and impartial manner.

- Establishment of new standards of professionalism in the hiring of auditors, which will be adopted and administered directly by the auditor general.

- Development of an established protocol for the referral of criminal matters to law enforcement officials.

- Coordination of activities with other auditors as well as state and federal agencies able to lend assistance.

#### PHILADELPHIA INQUIRER

DATE; THURSDAY February 2, 1989

PAGE: A01

SECTION: LOCAL

GRAPHICS: PHOTO

SOURCE: By Jodi Enda, Inquirer Harrisburg Bureau

DATELINE: HARRISBURG

#### HAFER FIRES 18 SHE SAYS BOUGHT JOBS

Auditor General Barbara Hafer crisscrossed the state yesterday to announce that she had fulfilled a campaign promise by firing 18 employees whose state jobs were bought for prices ranging from \$1,000 to \$5,000.

Hafer, who took office 16 days ago, said her two-week review of files provided by the FBI and the U.S. Attorney's Office found "overwhelming evidence" that the 18 employees were hired in past years after they or their acquaintances paid \$1,000 to \$5,000 for the jobs.

"We're talking about either the individual approaching an intermediary or directly going to the office — someone in the office of the auditor general — and saying, 'I want a job. I understand I can purchase a job. What's the price?' and that person giving the price," she said.



A "menu" or "laundry list" gave a price for each new job and promotion, Hafer said.

Hafer, Pennsylvania's new fiscal watchdog, planned to spend two full days to make her announcement in six cities. She justified the trip, which was to cost about \$1,400, as a "cleanup on the campaign" and as a way to acquaint herself with outlying offices.

"This is my attempt to put the issue to rest," she said during the day's first news conference here, referring to her pledge to dismiss some workers.

She said she notified the 18 employees of their dismissals by letter yesterday morning. She declined to release their names, saying it could jeopardize the state's position should the employees decide to sue.

Two of the employees were in top management at the bureau level, and the rest were members of the American Federation of State, County and Municipal Employees. Hafer said. A spokesman for her office said that 10 of the 18 were based in Pittsburgh, five in Harrisburg and one each in Philadelphia, Altoona and Berwick in northwest Pennsylvania.

The job-selling scheme began in the 1970s and resulted in jail terms for former Auditor General Al Benedict and two of his aides. Hafer said yesterday that she had evidence that one employee — an administrative officer — was hired under her immediate predecessor, Don Bailey, but has since resigned. Bailey could not be reached for comment yesterday.

Hafer chastised Bailey during a bitter campaign last fall for failing to fire employees who bought their jobs, but Bailey said he had "not one legal leg to stand on."

Asked whether she thought Bailey was part of the scheme, Hafer said that both her office and the U.S. attorney in Harrisburg were continuing the investigation.

"I do not have at this time any specific knowledge that Don Bailey was directly involved but we're tracking the money flow," she said.

Of the 18 employees who were fired, Hafer said 16 admitted that they bought their jobs.

"Two people said that they were not aware of it," she said. "It is hard to believe on the evidence that they weren't aware.

When they were told that someone else, and someone that they knew very well, bought their job, they said that's possible."

Hafer said her action yesterday was sure to boost morale.

"There's been a cloud of suspicion over this office for so many years," she said. "People that leave this office have problems finding jobs. Who's going to hire these people?"

After the Harrisburg news conference, Hafer, press secretary Chuck Morse and another spokesman, Jim Koval, drove to Philadelphia for a repeat performance. Hafer and Morse took a commercial plane to Pittsburgh, where they held a third news conference.

Today, they have scheduled similar news conferences in Erie, State College and Scranton.

Koval said the bulk of the \$1,400 cost was for a state plane to fly today from Pittsburgh to Erie, State College, Scranton and Harrisburg. Commercial air fare from Philadelphia to Pittsburgh cost \$126 apiece for Hafer and Morse, he said.

"It's actually cheaper to fly commercially, except the commercial schedules would not permit us to hit all those cities within the media times, if you will," Koval said. "And you cannot get from Wilkes-Barre (Scranton's airport) to Harrisburg without going to Philadelphia."

Hafer and Morse were to spend last night in Pittsburgh.

Hafer lives in Pittsburgh, but Koval said she would spend the night at the Weston William Penn Hotel, at a government rate of \$55. He said that at least one of Hafer's homes was so far from the airport that she "would have had to get up at 5 o'clock or earlier" to catch her morning flight. Morse said he was spending the night at his house.

Hafer said the trip would wrap up campaign issues and help her in her new job.

"I have not visited the Pittsburgh, Erie, Scranton, Philadelphia offices. I have been in Harrisburg and this is a time for me to go there and see these people directly and get acquainted with them."

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES C. MELO, JR. : CIVIL ACTION  
:   
vs. :   
:   
BARBARA HAER :   
and :   
JAMES J. WEST, ESQUIRE : NO. 89-2935

AFFIDAVIT OF PLAINTIFF JAMES C. MELO, JR.

COMMONWEALTH OF PENNSYLVANIA :  
: SS  
COUNTY OF BUCKS :

JAMES C. MELO, JR. being duly sworn according to law,  
deposes and states:

1. To the best of my knowledge, no money was paid by  
"Reds" Barbone to influence my promotion from Field Auditor  
I to Field III.

2. I did not learn that Mr. Kerr was alleging that Mr.  
Barbone made a payment to influence my promotion from Field  
Auditor I to Field Auditor III until 1988. Upon learning of the  
allegation, I spoke with Mr. Barbone and he denied that any  
such payment had been made. Mr. Kerr is a convicted felon and  
it is much more reasonable to believe Mr. Barbone than Mr.  
Kerr.

3. In 1981, I was promoted from Field Auditor III to Field  
Auditor IV and I served in that capacity until Ms. Hafer fired me  
on February 1, 1989. I am not aware of any allegation of "taint"  
in connection with my promotion from Field Auditor III to Field  
Auditor IV.

4. From the time I first began employment with the Office  
of the Auditor General in 1977 until the time Ms. Hafer fired me  
on February 1, 1989, I performed my duties in a competent and  
satisfactory manner. I did not receive any unfavorable evalua-  
tions and my work was not criticized. I was paid at the standard

wage scale for persons at my job classification and length of  
service. My employer received its "money's worth" in that I was  
paid at the standard compensation scale and performed my  
duties in a competent and satisfactory manner during my entire  
term of employment with the Office of the Auditor General.

James C. Melo, Jr.  
JAMES C. MELO, JR.

Sworn to and subscribed before  
me this 5th day of July, 1989

Eileen Jennifer Weiser  
NOTARY PUBLIC

NOTARIAL SEAL  
EILEEN JENNIFER WEISER, Notary Public  
Bensalem Twp., Bucks County  
My Commission Expires Oct. 24, 1992

COMMONWEALTH OF PENNSYLVANIA :  
: SS  
COUNTY OF WASHINGTON :

I, LOUISE JURIK, being duly sworn according to law,  
depose and state:

1. I was employed in the Department of Auditor General  
("Department") from August 1972 to February 1989.

2. During my employment, I was a member of the Amer-  
ican Federation of State and Municipal Employees  
("AFSCME"). My salary for employment with the Department  
was determined in accordance with the applicable collective  
bargaining agreement.

3. I performed my duties in a satisfactory manner and my  
job performance met all of the requirements of my position.

4. While employed in the Department, I was an employee  
of the Commonwealth of Pennsylvania. Further, it was the  
Commonwealth of Pennsylvania that was the employer-party to  
the collective bargaining agreement.

5. Because I performed my duties in a satisfactory manner and was paid in accordance with the collective bargaining agreement, my employer, the Commonwealth, did not suffer any financial injury as a result of my employment.

6. In 1988, I learned that an allegation was made that one John Lignelli paid money to John Kerr to influence a promotion for me. I was not aware of any such payment or even an allegation of payment prior to or at the time of my promotion which occurred on February 15, 1983.

7. It is preposterous to allege that John Lignelli would have made any payment on my behalf for a promotion for me. Mr. Lignelli and I have been public enemies for many years including 1983, many years prior thereto and many years subsequent thereto.

8. The promotion which I received in 1983 was first posted on February 2, 1983. A copy of the posting notice is attached hereto and marked Exhibit "1." I applied for the promotion and my application was granted on February 15, 1983. A copy of my application is attached hereto and marked Exhibit "2." A copy of the granting of the application is attached hereto and marked Exhibit "3."

9. Mr. Kerr resigned on February 4, 1983, only two days after the promotion was posted. There was simply not enough time between the date the promotion was posted and the date Mr. Kerr resigned for any transaction to have occurred between Mr. Lignelli and Mr. Kerr on my behalf. Not only was I not aware of any payment, it is my firm belief that no such payment was made.

10. Following the termination of my employment, I applied for unemployment compensation. The Department opposed my request and alleged that I committed wilful misconduct in connection with a payment being made for my 1983 promotion. A hearing was held and as a result of the hearing, I was awarded unemployment compensation. Attached hereto is a copy of the Notice of Determination of the Bureau of Unemployment Compensation.

11. I consider it ridiculous for Ms. Hafer to claim, on behalf of the Commonwealth, a financial injury. I have always performed my duties in a satisfactory manner and was paid in

accordance with the wage scale set in the collective bargaining agreement between the Commonwealth and AFSCME. The Commonwealth has always received its "money's worth" for my labors.

Louise Jurik  
LOUISE JURIK

Sworn to and subscribed before  
me this 10th day of August,  
1989.

Evelyn P. Dolnack  
NOTARY PUBLIC

NOTARIAL SEAL  
EVELYN P. DOLNACK, Notary Public  
Donora, Washington County, PA  
My Commission Expires Feb. 10, 1993



COMMONWEALTH OF PENNSYLVANIA :

: SS

COUNTY OF :

I, JAMES DiCOSIMO, being duly sworn according to law, depose and state:

1. I was employed in the Department of the Auditor General ("Department") from January 1980 to February 1989.

2. During my employment, I was a member of the American Federation of State and Municipal Employees ("AFSCME"); My salary for employment with the Department was determined in accordance with the applicable collective bargaining agreement.

3. I performed my duties in a satisfactory manner and my job performance met all of the requirements of my position.

4. While employed in the Department, I was an employee of the Commonwealth of Pennsylvania. Further, it was the Commonwealth of Pennsylvania that was the employer-party to the collective bargaining agreement.

5. Because I performed my duties in a satisfactory manner and was paid in accordance with the collective bargaining agreement, my employer, the Commonwealth, did not suffer any financial injury as a result of my employment.

6. In late 1983, I learned of an allegation that I made a cash payment to Guido Alesi for Mr. Alesi to give to John Kerr to influence my employment with the Department. I did not make such a payment and, of course, I have no knowledge of anything that transpired between Mr. Alesi and Mr. Kerr.

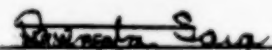
7. The Commonwealth has been aware of the allegation that money was paid in connection with my employment since 1983. In 1983, I testified before the grand jury concerning the allegation that a payment was made and I denied the allegation. I believe that Mr. Alesi also testified but I have no knowledge of the subject matter of his testimony. Neither Mr. Alesi nor I were indicted.

8. It is ridiculous for Barbara Hafer to claim, as she has in her Counterclaim, that I committed any fraud or misrepresentation in connection with the allegation that a payment was made by or through me in connection with my employment. This

allegation surfaced in 1983 and lead to my testimony before the grand jury. The nature and substance of the allegation has been public knowledge since 1983. It is equally ridiculous for Ms. Hafer to claim, on behalf of the Commonwealth, a financial injury. I have always performed my duties in a satisfactory manner and was paid in accordance with the wage scales set in the collective bargaining agreement between the Commonwealth and AFSCME. The Commonwealth got full value for its employment dollar.

  
JAMES DiCOSIMO

Sworn to and subscribed  
before me this 3rd day  
of August, 1989.

  
NOTARY PUBLIC

NOTARIAL SEAL  
BRENDA SAIA, NOTARY PUBLIC  
WAYNE TOWNSHIP, MIFFLIN COUNTY  
MY COMMISSION EXPIRES JULY 20, 1992  
Member, Pennsylvania Association of Notaries

COMMONWEALTH OF PENNSYLVANIA :  
 : SS  
 COUNTY OF CUMBERLAND :

I, KAROL DANOWITZ, being duly sworn according to law, depose and state:

1. I was employed in the Department of the Auditor General ("Department") from December 1980 to February 1989.

2. During my employment, I was a member of the American Federation of State and Municipal Employees ("AFSCME"). My salary for employment with the Department was determined in accordance with the applicable collective bargaining agreement.

3. I performed my duties in a satisfactory manner and my job performance met all of the requirements of my position.

4. While employed in the Department, I was an employee of the Commonwealth of Pennsylvania. Further, it was the Commonwealth of Pennsylvania that was the employer-party to the collective bargaining agreement.

5. Because I performed my duties in a satisfactory manner and was paid in accordance with the collective bargaining agreement, my employer, the Commonwealth, did not suffer any financial injury as a result of my employment.

6. In the spring of 1988, I learned that an allegation was made that back in 1980, my ex-husband, Harvey Danowitz, made a cash payment, through an intermediary, to someone in the Department to influence my employment with the Department. I was not aware of any such payment or even an allegation of payment prior to 1988. When I heard about the allegation, I asked my ex-husband if he had made such a payment and he said that no such payment had been made. Accordingly, I formed the belief that no such payment had been made and I continue to the present day to be of such a belief.

7. In the spring of 1988, I was interviewed by the FBI concerning my knowledge of whether or not a payment had been made to influence my employment. I told the FBI that I had no knowledge of such a payment.

8. Subsequent to the termination of my employment, I filed for unemployment compensation. The Department opposed my request and claimed that I had committed wilful misconduct. A hearing was held and as a result of the hearing, it was determined that I was entitled to unemployment compensation benefits. Attached hereto and marked Exhibit "1" is a copy of the Findings of Fact, Discussion and Determination of the Pennsylvania Unemployment Compensation Bureau.

9. I consider it ridiculous for Barbara Hafer to claim, as she has in her Counterclaim, that I committed fraud and misrepresentation. There is absolutely no evidence that I knew of the alleged payment and, as pointed out in the decisions of the Unemployment Compensation Bureau, "proof" that the payment was even made is based upon hearsay and double hearsay. It is equally ridiculous for Ms. Hafer to claim, on behalf of the Commonwealth, that the Commonwealth suffered any financial injury I have always performed my duties in a satisfactory manner and was paid in accordance with the wage scale set in the collective bargaining agreement between the Commonwealth and AFSCME. The Commonwealth has always received its "money's worth" for my work.

  
 KAROL DANOWITZ

Sworn to and subscribed  
 before me this 18th day  
 of August, 1989.

  
 NOTARY PUBLIC

NOTARIAL SEAL  
 ARDITH BUFFINGTON, Notary Public  
 Lwr. Allen Twp., Cumberland County  
 My Commission Expires Nov. 21, 1989



Commonwealth of Pennsylvania  
Office of the Auditor General  
Harrisburg 17120

February 14, 1989

Ms. Shelley G. Livingood  
50 East Muirfield Drive  
Reading, PA 19607

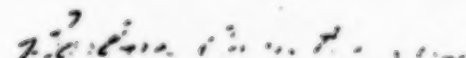
Dear Ms. Livingood:

This letter is to inform you that it has been determined that all Field Auditor I's, probationary status, will be terminated, effective at the close of business, March 15, 1989. This action is the result of contemplated changes in departmental policy.

Thank you for your service to the Department of the Auditor General and best wishes for your future endeavors.

You will be contacted by the Personnel Office regarding your rights on separation and the surrender of departmental property.

Sincerely,

  
Barbara Christianson  
Acting Personnel Director



AFSCME®

American Federation of State, County, and  
Municipal Employees • AFL-CIO  
Dauphin County Pennsylvania Public Employees  
District Council 90  
4031 Executive Park Drive • Harrisburg, Pennsylvania  
17111-1599 • 717-564-9312

March 30, 1989

Shelly G. Livingood  
50 East Muirfield Drive  
Reading, Pa. 19607

Dear Ms. Livingood:

Although I have strong exception to your letter dated March 15, 1989, I have enclosed a copy of the Collective Bargain Agreement as well as a Grievance Form.

Now let me address several points you made in your letter. First, I never told you that you would not be allowed to file a grievance because of any "deal", but rather because you were probationary.

Secondly, I had no knowledge of your "original hired date" prior to our conversation in February 1989, so I will not be held responsible for information you got prior to that. In fact, I have no way of knowing whether you would have been hired full time anyway.

In terms of yours being a political firing that is exactly what it is. However, since you had less than six (6) months with the Agency you were still considered on probation. In that regard, the Union could not save your job. Article 29, Section 5.

Ms. Livingood you were, or should have been fully aware of the political climate with the Auditor General when you were employed, and I don't appreciate you trying to blame the Union for what was "politics as usual".

In unity,

  
Fred Davis  
Council Director

FD: dfm  
cc: Lynne Vergot  
Enclosures



Shelly G. Livingood  
 March 30, 1989  
 Page - 2 -

P.S. By the way you fail to provide a return mailing address,  
 which is the reason for the delay in answering your letter.

# UNEMPLOYMENT COMPENSATION - NOTICE OF DETERMINATION

Last Date to Appeal May 2, 1989  
 Claimant: James C. Melo, Jr.  
 1054 Neshaminy Valley Dr.  
 Bensalem, PA 19020  
 SS#: 201-32-4293  
 Employer: Commonwealth of Penna.  
 Department of the  
 Auditor General  
 Room 325 Finance Bldg.  
 Harrisburg, PA 17121

## Findings of Fact

1. The claimant last worked for the Department of the Auditor General on February 1, 1989 at which time he was discharged for involvement in a 1983 job buying and/or promotion buying scheme.
2. The claimant was last employed as a Field Auditor IV at a final annual salary of \$33,000.
3. The employer states that the claimant's father-in-law, Mr. "Reds" Barbone, made a cash payment of \$2,700 to representatives of the Department of the Auditor General to obtain a promotion for the claimant.
4. The claimant denies any knowledge of such a payment.
5. An investigation into the job buying and/or job promotion scheme conducted by the Federal Bureau of Investigation (FBI) and in July 1988, the employer received the FBI's report.
6. No immediate disciplinary action was taken subsequent to the receipt of the FBI report of July 1988.

## Discussion

Section 3 of the Pennsylvania Unemployment Compensation Law requires that unemployment reserves be used for the benefit of persons "unemployed through no fault of their own."

Additionally, Section 402(e) of the Law mandates that "an individual will be ineligible for any week in which his unemployment is due to his discharge or temporary suspension from work for willful misconduct in connection with his work . . ."

While the phrase "willful misconduct" is not defined in the statute, the Commonwealth Court in *Kentucky Fried Chicken v. UCBR.*, 10 Pa Commonwealth Court 90, 309 A. 2d 165 (1973) stated that for behavior to constitute willful misconduct it must evidence: (1) the wanton and willful disregard for the employer's interests; (2) the deliberate violation of rules; (3) the disregard of standards of behavior which an employer can rightfully expect of an employee; or, (4) negligence which manifests culpability or wrongful intent.

In *Tundel v. UCBR.*, 44 Pa Commonwealth Court 312, 404 A. 2d 434 (1979), the Commonwealth Court found that "an incident of willful misconduct cannot be so temporally remote from the ultimate dismissal and still form the basis for a denial of benefits."

While the employer's right to discharge the claimant is certainly not in question, it must be noted that benefits cannot be denied absent the employer establishing the existence of willful misconduct.

The claimant denies any knowledge of the events which led to the February 1, 1989 discharge. No information has been provided which directly implicates the claimant or establishes the claimant's knowledge of these events. The employer's allegations are based on a report completed by the Federal Bureau of Investigation. That report, which indicates that it does not represent conclusions or recommendations, is wholly comprised of hearsay. No first-hand testimony has been introduced by the employer that would prove the involvement of the claimant.

In addition, although the employer has provided written materials detailing the allegations against the claimant, the allegations of job buying activities relate to actions of the claimant's father-in-law rather than to actions of the claimant. In any event, the actions occurred more than six years before the claimant's termination and are so temporally remote that they can not form the basis for a denial of benefits.

The employer has failed to carry its burden of proving either willful misconduct or that the claimant is unemployed through his own fault. The employer has not introduced any competent evidence to show that the claimant willfully engaged in action which was against the employer's interest or that any action of the claimant occurred at a point in time sufficiently close to the termination of the claimant to constitute grounds for denying benefits.

Therefore, the employer has not met the requisite burden under either Section 3 or 402(e) needed to deny benefits.

#### Determination

In accordance with Sections 3 and 402(e) of the Law, the claimant is eligible for benefits beginning with week ending February 4, 1989.



BUCB&A  
Representative

April 17, 1989  
Date Mailed

#### Appeal Instructions

Under Section 501(e) of the Pennsylvania Unemployment Compensation Law, this determination becomes final unless an appeal is timely filed. If you wish to file an appeal, a form may be obtained from any office of the Bureau of Unemployment Compensation, Benefits and Allowances. Appeals may be filed in person or by mail with the local office that issued the determination. If an appeal is filed by mail, it must be post-marked on or before the last day to appeal, as shown above, and forwarded to:

Bureau of UC Benefits & Allowances  
Adjudication Section  
Room 408 Labor and Industry Building  
Harrisburg, PA 17121

## UNEMPLOYMENT COMPENSATION — NOTICE OF DETERMINATION

Last Date to Appeal May 2, 1989

Name: Lucille J. Russell  
2023 Fifth Ave.  
Altoona, PA 16602

SS#: 193-36-9776

Employer: Commonwealth of Penna.  
Department of the  
Auditor General  
Room 325 Finance Bldg.  
Harrisburg, PA 17121

### Findings of Fact

1. The claimant last worked for the Department of the Auditor General on February 1, 1989 at which time he was discharged for involvement in a job buying scheme in 1980.
2. The claimant was last employed as a Field Auditor III at a final annual salary of \$30,000.
3. The claimant was hired January 14, 1980 as a Field Auditor I.
4. The employer states that the claimant's husband made a \$1,000 cash payment in 1980 to representatives of the Department of the Auditor General to secure this employment.
5. The claimant acknowledges a contribution to the campaign fund, but denies that the purpose of the payment was to purchase a job.
6. An investigation into the job buying scheme by the Federal Bureau of Investigation (FBI) was initiated and in July, 1988, the employer received the FBI's report.
7. The FBI report is based predominantly upon the testimony of a former "Executive Deputy to the Auditor General" and that testimony was itself based upon information provided by another former Auditor General employee.
8. No immediate disciplinary action was taken by the employer subsequent to the receipt of the FBI report of July, 1988.

9. On January 9, 1989, then Auditor General Don Bailey, advised the claimant that "our findings are inconclusive in the sense that we could not find any evidence to corroborate the information concerning you . . . even the information given the Department of the Auditor General by federal authorities indicated that you were entirely innocent of any knowledge of an alleged impropriety by someone on your behalf."

### Discussion

Section 3 of the Pennsylvania Unemployment Compensation Law requires that unemployment reserves be used for the benefit of persons "unemployed through no fault of their own."

Additionally, Section 402(e) of the Law mandates that "an individual will be ineligible for any week in which his unemployment is due to his discharge or temporary suspension from work for willful misconduct in connection with his work. . . ."

While the phrase "willful misconduct" is not defined in the statute, the Commonwealth Court in *Kentucky Fried Chicken v. UCBR*, 10 Pa Commonwealth Court 90, 309 A.2d 165 (1973) stated that for behavior to constitute willful misconduct it must evidence: (1) the wanton and willful disregard for the employer's interests; (2) the deliberate violation of rules; (3) the disregard of standards of behavior which an employer can rightfully expect of an employee; or, (4) negligence which manifests culpability or wrongful intent.

In *Tundel v. UCBR*, 44 Pa Commonwealth Court 312, 404 A.2d 434 (1979), the Commonwealth Court found that "an incident of willful misconduct cannot be so temporally remote from the ultimate dismissal and still form the basis for a denial of benefits."

While the employer's right to discharge the claimant is certainly not in the question, it must be noted that benefits cannot be denied absent the employer establishing the existence of willful misconduct.

The claimant denies any knowledge of the events which led to the February 1, 1988 discharge. No information has been provided which directly implicates the claimant or establishes the claimant's knowledge of these events. The employer's



allegations are based on a report completed by the Federal Bureau of Investigation. That report, which indicates that it does not represent conclusions or recommendations, is wholly comprised of hearsay. No first-hand testimony has been introduced by the employer that would prove the involvement of the claimant.

In addition, although the employer has provided written materials detailing the allegations against the claimant, the allegations of job buying activities relate to actions of the claimant's husband rather than to actions of the claimant. In any event, the actions occurred more than nine years before the claimant's termination and are so temporally remote that they can not form the basis for a denial of benefits.

The employer has failed to carry its burden of proving either willful misconduct or that the claimant is unemployed through her own fault. The employer has not introduced any competent evidence to show that the claimant willfully engaged in action which was against the employer's interest or that any action of the claimant occurred at a point in time sufficiently close to the termination of the claimant to constitute grounds for denying benefits.

Therefore, the employer has not met the requisite burden under either Section 3 or 402(e) needed to deny benefits.

#### Determination

In accordance with Sections 3 and 402(e) of the Law, the claimant is eligible for benefits beginning with week ending February 4, 1989.

  
BUCB&A Representative

April 17, 1989

Date Mailed

#### Appeal Instructions

Under Section 501(e) of the Pennsylvania Unemployment Compensation Law, this determination becomes final unless an appeal is timely filed. If you wish to file an appeal, a form may be obtained from any office of the Bureau of Unemployment Compensation, Benefits and Allowances. Appeals may be filed

in person or by mail with the local office that issued the determination. If an appeal is filed by mail, it must be postmarked on or before the last day to appeal, as shown above, and forwarded to:

Bureau of UC Benefits & Allowances  
Adjudication Section  
Room 408 Labor and Industry Building  
Harrisburg, PA 17121

# UNEMPLOYMENT COMPENSATION — NOTICE OF DETERMINATION

Last Date to Appeal May 1, 1989

Claimant: Walter W. Speelman

6220 Bedford St.

Harrisburg, PA 17111

SS#: 196-48-2825

Employer: Commonwealth of Penna.

Department of the

Auditor General

Room 325 Finance Bldg.

Harrisburg, PA 17121

## Findings of Fact

1. The claimant last worked for the Department of the Auditor General on February 1, 1989 at which time he was discharged for involvement in a job buying scheme in 1983.

2. The claimant was last employed as a Liquor Examiner II at a final annual salary of \$24,646.

3. The claimant was hired September 22, 1980 as a Liquor Examiner I.

4. The employer states that the claimant's mother-in-law, Mrs. Rachael Marte, made a \$1,500 cash payment in 1980 to representatives of the Department of the Auditor General, to secure this employment.

5. The claimant denies any prior knowledge of this payment or of the "job buying."

6. Following an investigation into the "job buying", the claimant was suspended in November, 1983.

7. In December, 1983 the claimant was reinstated to his position with the Department of the Auditor General and no further disciplinary action was taken by the employer until the claimant was discharged in 1989.

8. An additional investigation into the job buying scheme by the Federal Bureau of Investigation (FBI) was initiated and in July, 1988, the employer received the FBI's report.

9. The FBI report is based predominantly upon the testimony of a former "Executive Deputy to the Auditor General"

and that testimony was itself based upon information provided by another former Auditor General employee.

10. No immediate disciplinary action was taken by the employer subsequent to the receipt of the FBI report to discharge the claimant.

## Discussion

Section 3 of the Pennsylvania Unemployment Compensation Law requires that unemployment reserves be used for the benefit of persons "unemployed through no fault of their own."

Additionally, Section 402(e) of the Law mandates that "an individual will be ineligible for any week in which his unemployment is due to his discharge or temporary suspension from work for willful misconduct in connection with his work. . . ."

While the phrase "willful misconduct" is not defined in the statute, the Commonwealth Court in *Kentucky Fried Chicken v. UCBR*, 10 Pa Commonwealth Court 90, 309 A.2d 165 (1973) stated that for behavior to constitute willful misconduct it must evidence: (1) the wanton and willful disregard for the employer's interests; (2) the deliberate violation of rules; (3) the disregard of standards of behavior which an employer can rightfully expect of an employee; or, (4) negligence which manifests culpability or wrongful intent.

In *Tundel v. UCBR*, 44 Pa Commonwealth Court 312, 404 A.2d 434 (1979), the Commonwealth Court found that "an incident of willful misconduct cannot be so temporally remote from the ultimate dismissal and still form the basis for a denial of benefits."

While the employer's right to discharge the claimant is certainly not in the question, it must be noted that benefits cannot be denied absent the employer establishing the existence of willful misconduct.

The claimant denies any knowledge of the events which led to the February 1, 1988 discharge. No information has been provided which directly implicates the claimant or establishes the claimant's knowledge of these events. The employer's allegations are based on a report completed by the Federal Bureau of Investigation. That report, which indicates that it does

not represent conclusions or recommendations, is wholly comprised of hearsay. No first-hand testimony has been introduced by the employer that would prove the involvement of the claimant.

In addition, although the employer has provided written materials detailing the allegations against the claimant, the allegations of job buying activities relate to actions of the claimant's mother-in-law rather than to actions of the claimant. In any event, the actions occurred more than six years before the claimant's termination and are so temporally remote that they can not form the basis for a denial of benefits.

The actions leading to the claimant's dismissal took place in October, 1983. In November, 1983 the employer took prompt action in discharging the claimant. The claimant was reinstated, however, in December, 1983. During the remainder of his employment, no further action was taken, despite the fact that the employer received the FBI report in July of 1988. The discharge of February, 1989 is based on these same events. Furthermore, the claimant's reinstatement serves to indicate that the employer acknowledged that the claimant's behavior could not form the basis for the discharge. These same circumstances can not be resurrected to support a denial of benefits.

The employer has failed to carry its burden of proving either willful misconduct or that the claimant is unemployed through her own fault. The employer has not introduced any competent evidence to show that the claimant willfully engaged in action which was against the employer's interest or that any action of the claimant occurred at a point in time sufficiently close to the termination of the claimant to constitute grounds for denying benefits.

Therefore, the employer has not met the requisite burden under either Section 3 or 402(e) needed to deny benefits.

### Determination

In accordance with Sections 3 and 402(e) of the Law, the claimant is eligible for benefits beginning with week ending February 4, 1989.

  
BUCB&A Representative

April 14, 1989

Date Mailed

### Appeal Instructions

Under Section 501(e) of the Pennsylvania Unemployment Compensation Law, this determination becomes final unless an appeal is timely filed. If you wish to file an appeal, a form may be obtained from any office of the Bureau of Unemployment Compensation, Benefits and Allowances. Appeals may be filed in person or by mail with the local office that issued the determination. If an appeal is filed by mail, it must be post-marked on or before the last day to appeal, as shown above, and forwarded to:

Bureau of UC Benefits & Allowances  
Adjudication Section  
Room 408 Labor and Industry Building  
Harrisburg, PA 17121



5. On January 15, 1988, immediately after the guilty plea of former Auditor General Benedict to RICO charges arising out of the sale of state jobs and contracts, I received a letter from the new Auditor General of Pennsylvania, Don Bailey. In this correspondence, a copy of which is attached as Exhibit A, Mr. Bailey requested that we identify those Auditor General employees implicated in this job buying scheme. According to his letter, Mr. Bailey needed this information, so that, "[a]s a responsible public official," he could "take appropriate action on a case-by-case basis, against any employees who is accused or

seriously suspected of criminal wrongdoing". Mr. Bailey's correspondence further requested that we provide this information to him "not later than Friday, January 22, 1988."

6. Following receipt of Mr. Bailey's January 15 letter, I consulted with the various state officials involved in this investigation and representatives of the Federal Bureau of Investigation and the Internal Revenue Service regarding this request. Recognizing that Mr. Bailey, as Auditor General, had a legitimate interest in "tak[ing] appropriate action . . . against any employee who is accused or seriously suspected of criminal wrongdoing", it was agreed by all that a limited disclosure of information should be made to him. It should be noted that this course of action was consistent with the longstanding practice that existed in this particular investigation. Indeed, during the early stages of this investigation (1980-1982) numerous Auditor General employees (between twenty and thirty) that purchased their jobs were identified and almost all were terminated based on their participation in the scheme by then Auditor General Benedict. Moreover, it is the policy of the United States Attorney's Office for the Middle District of Pennsylvania to cooperate with state investigative and regulatory agencies by providing information under circumstances where the disclosure will not harm a continuing federal interest and can be legally made. It was decided that this was a situation meriting disclosure consisting of the names of twenty-one (21) Auditor General Office employees who had allegedly been hired or received promotions as a result of payments ultimately directed to senior officials in the Auditor General's office. The list of involved employees was prepared and checked by FBI Agents of the Harrisburg Resident Agency.

7. Before making any disclosure to Mr. Bailey, however, I assured myself that the limited disclosure of this information would be consistent with applicable federal laws. Thus, I strictly limited this disclosure to non-grand jury information, in order to avoid any inappropriate disclosure of matters occurring before the grand jury. The mechanics of preparing this list were as follows: First, the Auditor General's Office of Pennsylvania generated a computer print-out showing all current employees. The FBI agents conducting the investigation then compared that

print-out to the information obtained in debriefings of former First Deputy Auditor General John Kerr and former Auditor General Benedict, a source of information independent of the grand jury. Present employees who had payments made on their behalf were thus identified and their names were placed on the list to be disclosed to Auditor General Bailey pursuant to his letter of January 5, 1988.

8. On January 21, 1988 I responded in writing to Mr. Bailey's request for the names of those current Auditor General employees implicated in the job and promotion selling scheme. In my January 21 correspondence to Mr. Bailey, a copy of which is attached as Exhibit B, I provided Mr. Bailey with the names of these twenty-one (21) individuals provided to me by the FBI. I also noted for Mr. Bailey that the names of at least seven of these individuals were already a matter of public record from previous statewide investigative grand jury proceedings I had concluded between 1980 and 1982 as the Deputy Director of the Office of Criminal Law Enforcement. I further cautioned Mr. Bailey that he "should not presume" that any of these individuals had admitted to criminal misconduct, or even that these individuals were aware that their jobs or promotions had been purchased for them. I also requested that Mr. Bailey "keep these names strictly confidential (and) not use them in any type of media disclosures other than necessary to appropriate administrative proceedings."

9. On January 22, 1988 Mr. Bailey replied to my January 21 correspondence. In his January 22 letter, a copy of which is enclosed as Exhibit C, Mr. Bailey advised me that the Auditor General's office was deferring any administrative or disciplinary action in order not to prejudice our ongoing criminal investigation. I had not requested such a delay in proceedings and, in fact, I was surprised since the people involved in the investigation contemplated prompt administrative action by Bailey when the 21 names were made available.

10. On June 17, 1988 one of the principals in this job-buying scheme, Harold Imber, entered a guilty plea to federal racketeering and other charges. Accordingly, on June 21, 1988, I informed Mr. Bailey that "there is no longer any reason for you to refrain from taking appropriate action against the twenty-one



individuals identified to you in my letter of January 21, 1988". See Exhibit D. At the request of Mr. Bailey's counsel, I asked the FBI to determine if they could provide the Auditor General's office with an additional, limited disclosure of information on July 12, 1988. This disclosure, a copy of which is attached as Exhibit E, consisted of 21 "letterhead memoranda" prepared by the Federal Bureau of Investigation which related to this investigation. The release of these "letterhead memoranda", as opposed to actual FBI interview reports, was reviewed and sanctioned by FBI legal counsel.

11. The disclosures described in paragraphs 5 through 10, *infra*, constitute the only releases of information relating to the identities of those individuals implicated in this job-buying scheme which I sanctioned or participated in making. Contrary to the assertions contained in the Plaintiff's Complaint I did not disclose the identities of these individuals to Barbara Hafer while she was a candidate for the Office of Auditor General. Indeed, I specifically declined to provide the information to Ms. Hafer on two separate occasions as summarized in paragraphs 12 through 17 *infra*.

12. On October 4, 1988 I received a letter from Charles Lewis, the Campaign Manager for Barbara Hafer, who was at that time running for election as Auditor General of Pennsylvania. In his correspondence, a copy of which is attached as Exhibit F, Mr. Lewis simply reported allegations of criminal misconduct which had been received by him during the campaign.

13. On October 7, 1988 I received a letter from Barbara Hafer, a copy of which is attached as Exhibit G. In this correspondence, Ms. Hafer provided further information relating to the allegations previously reported to my office by Mr. Lewis. Ms. Hafer's letter also requested that I provide her with the names of those individuals whom I had previously identified to Mr. Bailey in January of 1988 and set forth several arguments in support of this position.

14. On or about October 18, 1988 I had a conference telephone conversation with Mr. Lewis and Ms. Hafer during which I informed them that I was in the process of preparing a letter indicating that notwithstanding the arguments made in

their October 7, 1988 letter to me, I could not provide the requested information since Ms. Hafer was merely a candidate for the Auditor General's office while Mr. Bailey was actually the Auditor General of Pennsylvania.

15. On October 19, 1988 I responded to Ms. Hafer's request for the names of these individuals. In my October 19 letter, a copy of which is attached as Exhibit H, I stated that:

"I have also thoroughly considered your request to have the names of the 21 individuals that I identified in January of 1988 for Auditor General Bailey as job purchasers made available to you, and regret I have concluded that is impossible at the present time. This information was gathered during an official investigation by the Federal Bureau of Investigation and comes basically from the debriefings of former Auditor General Al Benedict and John Kerr. The information was turned over to Auditor General Bailey in January because he is the only person in an official position to institute and direct appropriate administrative action against these people. Compliance with your request, on the other hand, could result in the general disclosure of these names and their use in the pending political campaign. This would not be an appropriate use of official materials gathered by the Federal Bureau of Investigation and forms the basis of why we must treat your request for disclosure differently than Mr. Bailey's."

Accordingly, I made no disclosure of this information to Ms. Hafer.

16. On November 15, 1988, following the state election, Ms. Hafer again wrote to me regarding this matter. In her November 15 correspondence, a copy of which is attached as Exhibit I, Ms. Hafer noted that she had been declared the victor in the election for Auditor General of the Commonwealth of Pennsylvania. As Auditor General-elect, Ms. Hafer then renewed her request for "the list of twenty-one (21) persons transmitted to Auditor General Don Bailey in January of 1988".

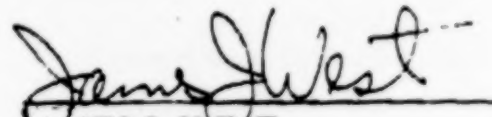
17. I responded to this request through a letter dated November 23, 1988, a copy of which is attached as Exhibit J. In my correspondence, I declined to immediately provide Ms.



Hafer with the list of these twenty-one (21) individuals, requesting instead that she secure that information directly from the files of the Auditor General's office. I agreed, however, to meet with Ms. Hafer once she was sworn in as Auditor General in order to brief her regarding the results of our own investigation into practices at the Auditor General's office.

18. Barbara Hafer was sworn in as Auditor General for the Commonwealth of Pennsylvania on January 17, 1989. Following her swearing-in, Ms. Hafer and I met on January 18, 1989 to discuss the results of the joint state/federal investigation into corruption at the Auditor General's office. At that time I stood ready to provide Ms. Hafer with the same information which I had previously tendered to Mr. Bailey in the form of a copy of my letter of January 21, 1988. I was informed, however, that Ms. Hafer had already secured this information through a search of the files left by outgoing Auditor General Bailey. Accordingly, I never provided this information directly to Barbara Hafer as she already had this information at the time of our first face to face meeting on January 18, 1989.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

  
JAMES J. WEST  
United States Attorney

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES C. MELO, JR. and	:	CIVIL ACTION
	:	
vs.	:	
	:	
BARBARA HAFER	:	
and	:	
JAMES J. WEST, ESQUIRE	:	NO. 89-2935

DECLARATION OF JAMES C. MELO, JR.

I, JAMES C. MELO, JR., being duly sworn according to law, depose and state:

1. I have no personal knowledge of communications between Barbara Hafer, James West and Donald Bailey concerning allegations that certain employs in the Office of the Pennsylvania Auditor General bought their jobs or that payments were made on behalf of said employees for jobs or promotions. I understand that both Ms. Hafer and Mr. West have denied communications between themselves concerning this matter in the course of the fall 1988 election campaign and that Mr. Bailey has made a declaration that there were such communications and that Ms. Hafer's references to the matter as a campaign issue could only have occurred following a "leak" from Mr. West. However, neither I nor the other plaintiffs would have personal knowledge of these matters and therefore are not in a position to take an Affidavit or Declaration, from personal knowledge, to dispute the declarations of Ms. Hafer or Mr. West. We therefore respectfully request that if the Court is of the opinion that Mr. Bailey's Declaration does not raise a genuine issue of material fact with regard to communications between Ms. Hafer and Mr. West that the Court defer any adjudication on Motions for Summary Judgment filed by Ms. Hafer and Mr. West until the conclusion of discovery and until

JA-246

our counsel has had an opportunity to examine under oath the defendants, Mr. Bailey and all persons who have knowledge of the matter.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATE: 8-18-89

\_\_\_\_\_  
JAMES C. MELO, JR.

JA-247

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

GROEN, LAVESON, GOLDBERG, RUBENSTONE & FLAGER  
BY: WILLIAM GOLDSTEIN  
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\_\_\_\_\_  
JAMES C. MELO, JR., et al. : CIVIL ACTION  
  
VS. :  
  
BARBARA HAER :  
and :  
JAMES J. WEST, FSQUIRE : NO. 89-2935

**NOTICE OF APPEAL**

Notice is hereby given that plaintiffs James C. Melo, Jr., Louise Jurik, Karol Danowitz, Lucille Russell, Donald Ruggiero, Walter W. Speelman, Jr., John Weikel and James DiCosimo hereby appeal to the United States Court of Appeals for the Third Circuit from the Orders entered in this action on September 28, 1989, to wit: granting the Motion for Summary Judgment of defendant Barbara Haer, granting the Motion of the United States to be substituted for defendant James J. West, Jr. and then granting the Motion to Dismiss of the United States for failure to state a claim on which relief may be granted, denying plaintiffs' Motion to Remand and all other action of the District Court taken that date ancillary to the dismissal with prejudice of Civil Action No. 89-2935.

GROEN, LAVESON, GOLDBERG,  
RUBENSTONE & FLAGER

BY: \_\_\_\_\_

  
WILLIAM GOLDSTEIN

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

GROEN, LAVESON, GOLDBERG, RUBENSTONE & FLAGER

BY: WILLIAM GOLDSTEIN

ATTORNEY I.D. #: 12532

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CARL GURLEY, et al.

: CIVIL ACTION

VS.

:

BARBARA HAER

: NO. 89-2685

**NOTICE OF APPEAL**

Notice is hereby given that plaintiffs Carl Gurley, Michael Brennan, Margaret Casper, Elizabeth Buchmiller, Gerard Best, Daniel Clemson, Mary Fager and George A. Franklin, Jr., hereby appeal to the United States Court of Appeals for the Third Circuit from the Order entered in this action on September 28, 1989 granting defendant Barbara Haer's Motion for Summary Judgment and the dismissal of said action with prejudice.

GROEN, LAVESON, GOLDBERG,  
RUBENSTONE & FLAGER

BY: 

WILLIAM GOLDSTEIN



4  
No. 90-681

Supreme Court, U.S.

FILED

APR 11 1991

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

BARBARA HAFFER,

*Petitioner*

v.

JAMES C. MELO, JR. AND CARL GURLEY, ET AL.,

*Respondents*

On Writ of Certiorari to the United States Court  
of Appeals for the Third Circuit

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**BRIEF FOR THE PETITIONER**

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## QUESTIONS PRESENTED

1. Is the Auditor General of Pennsylvania, acting within her official capacity in connection with the discharge of employees from the Department of the Auditor General, not a "person" under the Civil Rights Act, 42 U.S.C. §1983, and therefore not subject to civil damage actions instituted under that statute on behalf of the discharged employees?

2. Is not the Auditor General of Pennsylvania, acting within her official capacity in connection with the discharge of employees from the Pennsylvania Department of Auditor General, entitled to the absolute immunity of the Eleventh Amendment to the Constitution of the United States from civil damage actions in the federal courts instituted on behalf of the discharged employees?

## LIST OF PARTIES

The proceedings in the United States Court of Appeals for the Third Circuit involved two separate appeals from a single order of the United States District Court for the Eastern District of Pennsylvania which were docketed in the Court of Appeals at 89-1924 and 89-1925. The parties herein who participated in the appeal at 89-1924 included petitioner Barbara Hafer and respondents James C. Melo, Jr., Louise Jurik, Donald Ruggerio, Karol Danowitz, James Dicosimo, Lucille Russell, Walter W. Speelman and John Weikel (Melo respondents). The parties to the appeal at 89-1925 were petitioner Barbara Hafer and respondents Carl Gurley, W. Gerard Best, Michael Brennan, Margaret Casper, Elizabeth Buchmiller, Daniel Clemson, Mary Fager and George A. Franklin, Jr. (Gurley respondents).

James J. West, United States Attorney for the Middle District of Pennsylvania, was a co-appellee with petitioner in the appeal at No. 89-1924. The questions presented herein by the petitioner do not relate to the claims asserted against Mr. West nor to his defenses thereto and James J. West has not been named as a party nor entered an appearance herein.

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No. 90-681

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

BARBARA HAFFER,

*Petitioner*

v.

JAMES C. MELO, JR. AND CARL GURLEY, ET AL.,

*Respondents*

On Writ of Certiorari to the United States Court  
of Appeals for the Third Circuit

**BRIEF FOR THE PETITIONER**

**OPINIONS BELOW**

The Opinion of the United States Court of Appeals for the Third Circuit has been reported at 912 F.2d 628, and is reprinted in the Appendix to the Petition for Certiorari herein at p. A1. The Memorandum Opinion of the United States District Court for the Eastern District of Pennsylvania has not been reported. It is reprinted in the Appendix to the Petition for Certiorari at p. A36.

**JURISDICTION**

The judgment of the United States Court of Appeals for the Third Circuit, vacating the Order dated September 28, 1989, of the United States District Court for the Eastern District of

Pennsylvania granting summary judgment in favor of petitioner Barbara Hafer ("Hafer") was entered on August 21, 1990. Hafer's timely petition to the Court of Appeals for a rehearing before the entire court in banc was denied on September 21, 1990. The Petition for Writ of Certiorari was filed on October 26, 1990, and granted on February 25, 1991. This Court has jurisdiction over this matter under 28 U.S.C. §1254(1).

### CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Constitution of the United States, 11th Amendment.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

42 U.S.C. §1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

### STATEMENT OF THE CASE

The proceedings in the Court of Appeals arose out of two sets of actions (consisting of eleven separate cases) instituted in the United States District Court for the Eastern District of Pennsylvania by sixteen former employees of the Department of the Auditor General of the Commonwealth of Pennsylvania ("Department"), alleging violations of their civil rights as a result

of their having been discharged by Hafer upon her assuming the office of Auditor General in January 1989. Jurisdiction was based on 42 U.S.C. §§1983, 1985, 1988 and 28 U.S.C. §1343.

Eight of the lawsuits, consolidated in the District Court under the caption, *Melo, et al. v. Hafer and West* (JA 1), involve claims by eight individuals ("Melo respondents") whose employments were terminated by Hafer because of their participation in a job-buying scheme<sup>1</sup> uncovered by the United States Attorney for the Middle District of Pennsylvania, James J. West ("West").

During Hafer's 1988 election campaign as the Republican candidate for the position of Auditor General, she learned from newspaper reports that West had informed the then Auditor General, Donald Bailey ("Bailey"), that an investigation by the FBI had revealed that numerous employees of the Department had been hired or received promotions as a result of pay-offs to senior officials of the Department (JA 65).<sup>2</sup> Immediately following her inauguration on January 17, 1989 (JA 65), Hafer obtained access to the Department's files (JA 68), which included correspondence dated January 21, 1988, from West to Bailey identifying the employees for whose benefit the pay-offs had been made (JA 68, 87-89).<sup>3</sup> FBI summaries relating to the investiga-

1. Payment of monies to secure public employment or promotion therein is a criminal offense under Pennsylvania law, 18 Pa.C.S. §§4701, 5101, 7322.

2. Although the Melo complaint (JA 10, 13) alleges that Hafer acquired knowledge of the job-buying scheme directly from West as part of a conspiracy between West and Hafer, both Hafer (JA 65-68) and West (JA 238-244) submitted affidavits denying these allegations. In all events, as noted by the Court of Appeals, Hafer's conduct prior to her election was not "state action" prohibited by 42 U.S.C. §1983, and there was no allegation that "Hafer and West conspired . . . after Hafer took office." *Melo v. Hafer*, 912 F.2d 628, 638 (3d Cir. 1990) (A22).

3. Dear Mr. Bailey:

I am in receipt of the letter of January 15, 1988, from your Chief Counsel, Mr. McAneny, requesting "help and advice" concerning the sale of jobs within the administration of your predecessor, Alfred P. Benedict. I have consulted with the Attorney General of Pennsylvania, the relevant agents of the Harrisburg Resident Agency of the Federal Bureau of Investigations, the Internal Revenue Service, and the Pennsylvania Bureau of Criminal Investigations and have their concurrence in making a limited disclosure to you of non-grand jury information. This information will consist of a list of names of



tion (JA 68, 90-110), and the transcripts of interviews of the employees by Bailey's chief counsel, James J. McAneny (JA 68-69, 111-168). Hafer then conducted an independent investigation of the matter (JA 69), including interviews of West, the FBI agents who conducted the federal investigation and John M. Kerr, a major participant in the scheme (JA 62, 69).<sup>4</sup> On February 1, 1989, after reviewing the information in the Department's files or obtained during the Department's investigation, Hafer terminated the employment of eighteen individuals, including the eight Melo respondents, who had been hired or promoted by reason of payments made by them or on their behalf (JA 71-77).<sup>5</sup>

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NOTES (Continued)

present Auditor General Office employees on whose behalf either Al Benedict or John Kerr have stated they received a payment in exchange for employment at the Pennsylvania Auditor General office.

This list is as follows:

1. Don Ruggerio
2. James C. Melo, Jr. (Promotion)

- .....
13. Walter Speelman
  14. John E. Weikel

- .....
17. Louise Jurik (Promotion)
  18. James Discosimo
  19. Karol Danowitz

- .....
21. Lucille Russell

.....

Sincerely,

s/ James J. West

James J. West

United States Attorney

4. John M. Kerr ("Kerr") served as Executive Deputy Auditor General under Pennsylvania Auditor General Alfred P. Benedict ("Benedict") from 1977 to early 1983 (JA 60). On June 29, 1984, after an eleven-day trial, Kerr was found guilty of 139 state criminal charges relating to the scheme and was sentenced to imprisonment for a term of two to five years (JA 60-61). Benedict, Bailey's predecessor, pleaded guilty in January 1988 to federal criminal charges arising out of the job-buying scheme (JA 89, 239).

5. At the time, the Department employed 783 employees (JA 172).

The Melo respondents asserted claims (JA 7-19) against Hafer and West under 42 U.S.C. §1983 for deprivation of the rights of due process and free speech and a conspiracy to deprive them of these rights, and separate state law claims against West alone. The only relief sought by the Melo respondents is monetary; none of the Melo respondents sought to be reinstated in their former positions.<sup>6</sup>

The second group of actions involve an additional eight individuals ("Gurley respondents") who were terminated as part of a management overhaul of the Department. The Gurley respondents were managerial level employees who were replaced by promotions from within the Department (JA 77-78).

These actions were also consolidated in the District Court under the caption, *Gurley, et al. v. Hafer* (JA 3). The Gurley respondents allege claims against Hafer only for deprivation of due process and freedom of speech.<sup>7</sup>

Two of the Gurley respondents (Gurley and Best) seek only damages (JA 26-29, 33-36). Six of the Gurley respondents, who joined in one complaint (JA 37-55), also request reinstatement to their former positions. Their complaint expressly alleges that they claim reinstatement relief from Hafer in her "official capacity" and damages from Hafer in her "personal capacity" (JA 41, 44, 47, 49, 52, 55).

Hafer answered the complaints (JA 20-25, 30-32), raising a number of legal defenses, including in particular the defense that the actions were barred by the Eleventh Amendment to the

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6. Seven of the eight Melo respondents, excepting Melo who was not covered by a union contract, filed grievances contesting their discharge pursuant to the Department's collective bargaining contract (JA 170). After plenary arbitration hearings conducted in accordance with the grievance procedures of this contract, each of the seven respondents has been reinstated.

7. The claims by both groups of respondents for deprivation of freedom of speech are based on their allegations that they were terminated because of their political affiliation. There is no mention in the personnel files of any of the Melo or Gurley respondents of their political affiliation (JA 171). Hafer was unaware of their political affiliations until the filing of these actions in the District Court in which respondents have claimed to be registered Democrats (JA 72-82).

United States Constitution ("Eleventh Amendment").<sup>8</sup> These defenses were for the most part applicable to both groups of actions and were presented to the District Court by way of a consolidated Motion for Summary Judgment (JA 56), supported by a voluminous appendix containing factual affidavits and documentary exhibits (JA 57-172).<sup>9</sup>

On September 28, 1989, the District Court entered an Order (A35)<sup>10</sup> and Memorandum Opinion (A36), granting Hafer's Motion for Summary Judgment and dismissing both the Melo and Gurley actions.<sup>11</sup> It was the District Court's view that Hafer's actions in discharging the respondents were effected in her official capacity as Auditor General of Pennsylvania and that she was not a "person" subject to the provisions of 42 U.S.C. §1983, relying on the recent opinion of this Court in *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304 (1989) (A37).<sup>12</sup>

Separate appeals were taken from the District Court's Order by the Melo respondents and the Gurley respondents,

8. E.g., "Plaintiff's claims are barred by the Eleventh Amendment" (JA 24).

9. In the Melo action, West also filed a Motion To Dismiss the Complaint or, in the Alternative, for Summary Judgment ("Motion to Dismiss") and the United States of America filed a motion to be substituted in place of defendant James J. West as to the state law counts.

10. Page references to the Orders and Opinions of the District Court and Court of Appeals preceded by "A" are to the Appendix to Hafer's Petition for Certiorari where they are reproduced.

11. The Order dismissing the Melo action was applicable to both Hafer and West and the District Court denied West's Motion to Dismiss on the grounds of mootness. The District Court did, however, grant the motion of the United States to be substituted as defendant with respect to the state law counts of the Melo complaint and dismissed those counts on the ground that West's conduct in connection with these counts was certified by the United States to have been within the scope of his employment necessitating substitution, 28 U.S.C. §2679(b)(1), and that the United States had not waived its defense of sovereign immunity with respect to the state claims asserted therein, 28 U.S.C. §2680(h) (A42).

12. Although Hafer presented factual material and legal argument addressed to the merits of respondents' substantive claims, the District Court, in view of its decision that 42 U.S.C. §1983 was inapplicable, did not reach these issues.

which appeals were consolidated for argument before the Court of Appeals (JA 4, 6). The appeals were argued before a panel consisting of Judges Dolores K. Sloviter, Edward R. Becker and Walter K. Stapleton on March 16, 1990. On August 21, 1990, the Court of Appeals filed an Opinion, 912 F.2d 628 (3d Cir. 1990) (A1 ), vacating the Order of the District Court dismissing the claims against Hafer.<sup>13</sup>

The principal basis for the Court's reversal of the District Court's grant of summary judgment<sup>14</sup> in favor of Hafer as to *all*

13. The Court further vacated the District Court's dismissal of the state law claims as to West and remanded for evaluation by the District Court of the United States' certification that West's conduct was within the scope of his employment (912 F.2d at 639-42; A23-A31). The dismissal of the civil rights action against West was affirmed, however, on the ground that the civil rights conspiracy alleged by the Melo respondents, which occurred prior to Hafer being elected Auditor General of Pennsylvania, was insufficient to impose liability against West, a non-state actor, under 42 U.S.C. §1983 (912 F.2d at 637-39; A20-A23).

14. Although the Court of Appeals treated the District Court's decision, for scope of review purposes, as a dismissal of the pleadings rather than as a grant of summary judgment (912 F.2d at 633-34; A10-A13), the matter was submitted to the District Court, pursuant to the Court's direction (JA 1, 3), in connection with Hafer's Motion for Summary Judgment, and the District Court expressly stated that it was granting summary judgment in Hafer's favor (A35). Hafer and her attorneys spent considerable time, effort and expense in gathering factual material relating to Hafer's defenses as to the merits of respondents' claims, and respondents were *not* prevented from taking discovery concerning these matters or from requesting additional time in accordance with Fed.R.Civ.P. 56(f). Although asserting a lack of discovery as a reason for not answering Hafer's contentions on the merits in their brief in the District Court, respondents utterly failed to conform to the requirements of Rule 56(f) and therefore waived the right to challenge the entry of summary judgment on that ground. The Declaration of James C. Melo, Jr. (JA 245-246) relied upon by respondents and by the Court of Appeals (912 F.2d at 634; A12-A13), was attached as an exhibit only to the Melo respondents' answer to West's Motion to Dismiss, and was not referred to in their response to Hafer's Motion for Summary Judgment and, in all events, was limited to Melo's lack of information concerning the alleged communications between Hafer and West prior to Hafer's election as Auditor General. The Declaration did not assert need for additional discovery with respect to the official nature of Hafer's actions in discharging the respondents or as to the merits of respondents' claims. The Court of Appeals' refusal even to consider the factual presentation made by Hafer in support of her Motion for Summary Judgment is contrary to a number

of the respondents is that one of the complaints, joined in by *only six* of the eight Gurley respondents, expressly asserted claims for monetary damages against Hafer in her "personal capacity" and that state officials *sued* in their personal capacities are subject to liability for damages<sup>15</sup> under 42 U.S.C. §1983 and are not entitled to the immunity afforded by the Eleventh Amendment. 912 F.2d at 634-37 (A13-A19). In so holding, the Court of Appeals rejected Hafer's contention that, in discharging respondents, she was *acting* in her official capacity pursuant to employment policies established by her as the elected head of the Department. 912 F.2d at 636-37 (A17-A18).

### SUMMARY OF ARGUMENT

This Court, in *Will v. Michigan Dept. of State Police*, *supra*, expressly held that "neither a state nor its officials *acting in their official capacities* are 'persons' under [42 U.S.C.] §1983." 491 U.S. at 71, 109 S.Ct. at 2312. It follows that state officials, acting in their official capacities, have the same status as the State itself, and are absolutely immune from suits for damages in federal court under the Eleventh Amendment.

Hafer, as the elected Auditor General of the Commonwealth of Pennsylvania and as chief executive officer of the

Department, is invested with full authority to hire and fire employees of the Department. She was therefore *acting in her official capacity* in discharging the respondents and is not subject to a damage action under 42 U.S.C. §1983 both as a matter of statutory construction and by application of the Eleventh Amendment.

The decision of the Court of Appeals for the Third Circuit that Hafer may be *sued in her "personal" capacity* for damages under 42 U.S.C. §1983 *for conduct admittedly performed in her official capacity* is contrary to the explicit holding in *Will*. Further, it is not supported by the prior opinions of this Court.

The Court of Appeals, by permitting Hafer, an elected state executive officer, to be subject to damage liability for acts conducted both within the scope of her authority and in connection with the internal management of the Department has impinged upon the concepts of federalism implicit in the restrictions of the Eleventh Amendment. The jurisdictional rule adopted by the Court of Appeals, which authorizes a plaintiff to assert a civil rights damage claim against an elected state officer in the officer's personal capacity, without regard to the nature of the officer's acts, will have a chilling effect upon the exercise by state officials of their authority and responsibility to manage the affairs of state government in an efficient and orderly manner.

### NOTES (Continued)

of recent decisions by the Court of Appeals enforcing the requirements of Rule 56(f). See, e.g., *Dowling v. City of Philadelphia*, 855 F.2d 136, 139-40 (3d Cir. 1988); *Hancock Industries v. Schaeffer*, 811 F.2d 225, 229-30 (3d Cir. 1987). The Court could and should have reviewed the factual material to determine whether the District Court's grant of summary judgment was sustainable on the lack of merit of respondents' claims with respect to the alleged deprivation of due process and free speech.

15. The Court of Appeals also held that the District Court erred in dismissing the combined complaint of the six Gurley respondents who also sought reinstatement on the ground that state officers may be sued under 42 U.S.C. §1983 in their official capacities for prospective relief. 912 F.2d at 635-36 (A15). Because of the obvious inconsistency involved in asserting claims against a state officer in both capacities, "official" and "personal", the six Gurley respondents seeking reinstatement, as well as damages, have not emphasized the differences in their legal position from that of the other respondents, but have joined in the respondents' principal argument that their action was against Hafer in her personal, not official, capacity.



## ARGUMENT

**HAFER, IN TERMINATING THE RESPONDENTS, WAS ACTING IN HER OFFICIAL CAPACITY AS AUDITOR GENERAL OF PENNSYLVANIA AND IS NOT SUBJECT TO SUIT FOR DAMAGES UNDER 42 U.S.C. §1983. MOREOVER, THE CLAIMS AGAINST HAFER IN HER OFFICIAL CAPACITY ARE BARRED BY THE ELEVENTH AMENDMENT.**

**I. Under This Court's Opinion in *Will v. Michigan Dept. of State Police*, a State Officer Acting in the Officer's Official Capacity Is Not a Person Under 42 U.S.C. §1983 and Is Immune From Liability Under the Eleventh Amendment.**

It is undisputed that, absent waiver by the State or congressional abrogation, the Eleventh Amendment bars a damage action against a State in federal court. *Kentucky v. Graham*, 473 U.S. 159, 169, 105 S.Ct. 3099, 3107 (1985). The Amendment also bars damage suits against a state officer in his or her official capacity because "a judgment against a public servant in his official capacity imposes liability on the entity that he represents." *Id.*, quoting *Brandon v. Holt*, 469 U.S. 464, 471, 105 S.Ct. 873, 878 (1985). Moreover, this Court, in a recent decision, has further held that a State or a state official, in that person's official capacity, cannot be sued in any court for damages under 42 U.S.C. §1983, because they are not "persons" subject to liability under the statute. *Will v. Michigan Dept. of State Police*, *supra*.

A state officer may, however, be subject to liability for damages for acts committed in his personal capacity, *Kentucky v. Graham*, *supra*, 473 U.S. at 165, 105 S.Ct. at 3105, and is subject to an action against him in his official capacity to secure prospective relief from alleged violation of rights protected by federal law, *Will v. Michigan Dept. of State Police*, *supra*, 491 U.S. at 71 n. 10, 109 S.Ct. at 2311-12 n. 10; *Kentucky v. Graham*, *supra*, 473 U.S. at 167 n. 14, 105 S.Ct. at 3106 n. 14; *Ex parte Young*, 209 U.S. 123, 159-60, 28 S.Ct. 441, 453-54 (1908).

This Court has on several occasions discussed the distinction between personal capacity<sup>16</sup> and official capacity suits in connection with various issues. See, e.g., *Kentucky v. Graham*, *supra* (liability of state for fees under 42 U.S.C. §1988, where state officer sued in personal capacity); *Brandon v. Holt*, *supra* (liability of city for acts of city officer sued in official capacity). The elements of each type of action were summarized in *Kentucky v. Graham*, *supra*, as follows (473 U.S. at 166, 105 S.Ct. at 3105):

On the merits, to establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. . . . More is required in an official-capacity action, however, for a governmental entity is liable under § 1983 only when the entity itself is a "moving force" behind the deprivation . . . ; thus, in an official-capacity suit the entity's "policy or custom" must have played a part in the violation of federal law. (Citations omitted).

Although the decision in *Kentucky v. Graham* purported to define more clearly the differences between the two forms of action, it did not consider the question presented herein, whether a state officer may be sued in his personal capacity for acts performed in the officer's official capacity. Prior to this Court's opinion in *Will v. Michigan Dept. of State Police*, *supra*, the lower federal courts reached conflicting conclusions on this issue.<sup>17</sup> This disparity in the federal decisions was apparently

16. As this Court noted in *Kentucky v. Graham*, *supra*, 473 U.S. at 165 n. 10, 105 S.Ct. 3105 n. 10, "personal capacity actions are sometimes referred to as individual capacity actions."

17. Compare cases holding that a personal capacity action could not be asserted for acts in the state officer's official capacity, *Rodriguez v. James*, 823 F.2d 8 (2d Cir. 1987); *Jones v. Smith*, 784 F.2d 149 (2d Cir. 1986); *Beehler v. Jeffes*, 664 F.Supp. 931, 943 n. 20 (M.D. Pa. 1986); *Lewis v. Kelchner*, 658 F.Supp. 358, 361-62 (M.D. Pa. 1986), with cases holding that a personal capacity action could be so asserted, *Farid v. Smith*, 850 F.2d 917, 921 (2d Cir. 1988); *Shockley v. Jones*, 823 F.2d 1068, 1071 (7th Cir. 1987). See also *Meadows v. Indiana*, 854 F.2d 1068 (7th Cir. 1988); *Kolar v. County of Sangamon*, 756 F.2d 564, 568 (7th Cir. 1985), in which the court presumed that the action was against the state officers in their official capacity where there was no allegation of personal capacity.

resolved by this Court in *Will v. Michigan Dept. of State Police*, *supra*.

In *Will*, a state employee brought an action under 42 U.S.C. §1983 in the Michigan state courts against the Michigan Department of State Police and its director, alleging that he had been denied a promotion for an improper reason in violation of his civil rights. The Eleventh Amendment does not bar actions instituted in the state courts, and at the time there was a conflict in the federal and state courts as to susceptibility of States and state officers to a damage action under 42 U.S.C. §1983 in the state courts. The Michigan Supreme Court held that neither the State, acting through its Department of Police, nor the Director of State Police, acting in his official capacity, were "persons" under §1983, and they were therefore not subject to liability for damages under that statute in the state courts.

That decision was affirmed by this Court as to both the State and the Director of State Police. In extending its ruling to the Director, this Court stated as follows (491 U.S. at 71, 109 S.Ct. at 2311-12):

Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. . . . As such, it is no different from a suit against the State itself. . . . We see no reason to adopt a different rule in the present context, *particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device*.

*We hold* that neither a State nor its officials *acting in their official capacities* are "persons" under §1983. The judgment of the Michigan Supreme Court is affirmed. (Citations and footnotes omitted; emphasis added).

It is obvious that this determination is equally applicable to bar a damage suit against a state official in the federal courts as well as in the state courts. In concluding that 42 U.S.C. §1983 does not authorize actions against States in state courts, the Court was largely influenced by the limitations upon such

actions in the federal courts imposed by the Eleventh Amendment. *Will*, 491 U.S. at 66-67, 109 S.Ct. at 2309.<sup>18</sup> Moreover, the Court's construction of the statutory term "persons" to exclude state officials *acting* in their official capacities cannot be limited to state court actions and must be applied with equal effect to civil rights actions commenced in the federal courts.

It appears from the Court's use of the term "*acting* in their official capacities," rather than "*sued* in their official capacities," that the Court has concluded that a state officer may not be sued in his personal capacity under 42 U.S.C. §1983 for acts committed in the performance of the officer's official state duties. In other words, it is the conduct itself which is important to the determination whether the action is against the individual in his "official" or "personal" capacity, *not* the plaintiff's characterization of that capacity.

That this is the effect of the Court's decision in *Will* has already been recognized by the Court of Appeals for the Sixth Circuit in *Rice v. Ohio Dept. of Transp.*, 887 F.2d 716 (6th Cir. 1989). *Rice* involved an action under 42 U.S.C. §1983 by a state employee against his departmental employer, the State Department of Transportation, and the director and deputy director thereof, for damages incurred as a result of plaintiff's being passed over for promotion for alleged improper reasons. In affirming the grant of summary judgment in favor of defendants, the Sixth Circuit held that the state officials, having *acted* in their official capacities in connection with plaintiff's promotion, were not "persons" subject to liability under 42 U.S.C. §1983, notwithstanding plaintiff's allegation of "personal capacity" (887 F.2d at 718-19):

Insofar as the director and deputy director were acting in their official capacities, it is now clear that they, like the state itself, were not "persons" within the meaning of § 1983 [quoting *Will*]. . . .

18. "[I]n deciphering Congressional intent as to the scope of §1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of §1983 that disregards it."



Although the complaint filed by Mr. Rice alleges at one point that the individual defendants were acting both "in their official and personal capacities," the record does not suggest in any way that the defendants' actions were somehow unofficial. *The capacity in which the individual defendants were in fact acting is what matters, not the capacity in which they were sued*; congressional intent is not to be circumvented Will says "by a mere pleading device". . . . (Emphasis added).

See also *Cowan v. University of Louisville School of Medicine*, 900 F.2d 936 (6th Cir. 1990) (action by former medical student against state medical school officials for alleged wrongful dismissal); *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989) (action by state employee against director of state agency for alleged wrongful discharge).

This conclusion<sup>19</sup> as to the holding in *Will* follows from the express language used by the Court. It is certainly applicable to the conduct of Hafer which is the subject matter of the instant action.

There is no question that Hafer was acting in her official capacity in discharging the respondents. The Court of Appeals expressly acknowledged that "Hafer, the head of the Department . . . is vested under state law with authority to hire and fire employees in the Department. . . ." (912 F.2d at 636 n. 8; A17 n. 8).<sup>20</sup> A fuller discussion of the nature of Hafer's acts is set

19. There are federal courts, including the Court of Appeals for the Third Circuit in the instant matter, which, subsequent to the issuance of this Court's opinion in *Will*, have strained to ignore the plain language thereof and continue to hold that state officers may be subject to a damage action under 42 U.S.C. §1983 for acts committed in their official capacity merely by alleging or otherwise asserting that the officer is being *sued* in the officer's personal capacity. *Price v. Akaka*, 915 F.2d 469 (9th Cir. 1990) (action against state trustees to enforce provisions of federal law relating to utilization of trust funds); *Laidley v. McClain*, 914 F.2d 1386 (10th Cir. 1990) (action by employees against district attorney for alleged wrongful discharge). These decisions are contrary to the explicit language of *Will*. They are, further, not supported by other opinions of this Court or by policy considerations.

20. The Auditor General of Pennsylvania is an elected official under the Pennsylvania Constitution, Pa. Const. Art. IV, §§1, 18, who has been entrusted with the responsibility of insuring that all monies to which the

forth in the Opinion of the District Court (A40):

Hafer's removal of plaintiffs from their positions occurred in her role as Auditor General, a constitutional officer under the Pennsylvania Constitution. Pa. Const. art. IV, §18. Although Hafer, as Auditor General, directed the firings, plaintiffs were employees of the Commonwealth, not of Hafer. Their grievances are directed against the impact of the Commonwealth's termination of their employment. *Hafer's power to cause the terminations derived solely from her authority as a state official. Had Hafer been acting in a personal capacity, she would not have been empowered to effectuate the discharges. . . . If Hafer had not been elected, or if she had not fired plaintiffs, there would not have been a basis for these §1983 causes of action.* (Emphasis added; footnote omitted).<sup>21</sup>

Commonwealth is entitled are deposited in the State Treasury and making certain that the public money is disbursed legally and properly. The Auditor General's functions include auditing, examining and reporting upon claims against the Commonwealth, settling and collecting accounts of Commonwealth officials and acting as a member of the Pennsylvania Board of Finance and Review. 71 Pa.S. §§115, 246; 72 Pa.S. §§401-08, 3941.1-3941.9, 4081-4092, 4341-4431. These functions are carried out by the Auditor General through the Department which was established by the Pennsylvania Legislature as an independent governmental unit. 71 Pa.S. §61. Under Pennsylvania law, the Auditor General is the final decision-maker for the Department, possessing the exclusive right to set policy and make personnel decisions. 71 Pa.S. §66.

21. This determination as to Hafer's authority, as is evident from the District Court's analysis and as this Court has ruled, *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123-24, 108 S.Ct. 915, 924 (1988), involves a question of state law and respondents have never refuted the basis of Hafer's authority in this respect. To the extent, if any, there is a factual determination relating to Hafer's acts being within her "official" capacity, these facts were fully presented to the District Court in connection with Hafer's Motion for Summary Judgment. The Declaration of James C. Melo, Jr. (JA 245-246), attached to respondents' answer to West's Motion to Dismiss, asserting the need for further discovery was limited to the facts concerning the alleged conspiracy between Hafer and West and respondents fully argued to the District Court their contentions as to the jurisdiction of the Court over Hafer under the Eleventh Amendment and 42 U.S.C. §1983 in opposition to Hafer's Motion for Summary Judgment. There is therefore no reason to resubmit this



**II. The Decision of the Court of Appeals for the Third Circuit That Hafer Could Be Sued in Her Personal Capacity for Conduct in Her Official Capacity Is Contrary to the Express Holding in *Will* and Is Not Supported by the Prior Decisions of this Court.**

The refusal of the Court of Appeals to accept the plain language of this Court that a state officer is not a person under 42 U.S.C. §1983 in connection with conduct performed in the officer's official capacity is based upon the rationale that a personal capacity action, as well as an official capacity action, may be asserted against a governmental official who acts under color of state law, notwithstanding the circumstances and nature of the act. The defect in this reasoning is that it fails to recognize a distinction between acts of state officials under color of state law which are *outside* of the official's authority or which are *not essential* to the operation of the State government, and acts of state officials which are both *within* the official's authority and *necessary* to the performance of the State's governmental functions, such as the hiring and firing of employees. These latter acts are simply acts of the State which are not subject to damage liability under 42 U.S.C. §1983 by reason of the Eleventh Amendment, as well as this Court's interpretation of that statute in *Will*.

As was stated in *Nix v. Norman*, *supra*, 879 F.2d at 431:

Generally, *individual-capacity suits involve actions taken by governmental agents outside the scope of their official duties. Official-capacity suits typically involve either allegedly unconstitutional state policies or unconstitutional actions taken by state agents possessing final authority over a particular decision.* . . . (Emphasis added).

The decisions of this Court cited by the Court of Appeals in support of its contrary conclusion (912 F.2d at 637; A18) simply do not meet the issue and certainly do not hold that a personal capacity action may be brought against a state officer for conduct

**NOTES (Continued)**

question to the District Court for the development of an additional record relating thereto. *Nix v. Norman*, 879 F.2d 429, 432 (8th Cir. 1989).

within the officer's authority and in performance of a governmental function. The six limited immunity cases recited in the Court of Appeals' Opinion, for example, either involve acts outside the state officer's authority, *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092 (1986) (suit by arrestee against state trooper for wrongful arrest); *Tower v. Glover*, 467 U.S. 914, 104 S.Ct. 2820 (1984) (suit by clients against public defenders who allegedly conspired with state officials); *Procunier v. Navarette*, 434 U.S. 555, 98 S.Ct. 855 (1978) (suit by prisoner against state prison officials for negligent interference with mail), or involve holdings that the state officer was entitled to either a qualified or absolute immunity so that the issue of official/personal capacity was not considered, *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012 (1984) (suit by employee against state officer for wrongful discharge); *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984 (1976) (suit by former prisoner against state prosecuting attorney).

*Brandon v. Holt*, 469 U.S. 464, 105 S.Ct. 873 (1985) and *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398 (1980), do not even concern the liability of state officers. In *Brandon*, the Court merely concluded that an action initially instituted, prior to the decision in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978), against a city's director of police in his personal capacity for policies established in his official capacity was in fact tried, subsequent to *Monell*, as an official capacity action against the city, and the city, not the director of police, was liable for plaintiff's damages. Similarly, in *Owen v. City of Independence*, *supra*, the Court held that a city was not entitled to avoid liability for acts of a city officer on the ground of qualified immunity.<sup>22</sup>

<sup>22</sup> The decision of the Court of Appeals is also not supported by the legislative history of Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, the precursor of 42 U.S.C. §1983. This Court has on several occasions delved deeply into that history in an attempt to glean the meaning of the term "person" as applied to governmental entities. *Monroe v. Pape*, 365 U.S. 167, 171-87, 81 S.Ct. 473, 475-84 (1961); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 665-89, 98 S.Ct. 2018, 2022-35 (1978); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 68, 109 S.Ct. 2304, 2310 (1989).

The Court's reference in *Brandon* to the "course of the proceedings," rather than to the pleadings, as governing the determination of the type of action, must be read in light of the peculiar timing of that case, having been instituted when the city could not be subject to liability and tried after it could be. That decision cannot be relied upon, as the Court of Appeals (912 F.2d at 635; A15) and respondents have, as supporting the conclusion that it is the plaintiff's characterization of the case during the proceedings, not the nature of the conduct, which governs the determination whether the action is in a state officer's personal capacity. To permit the plaintiff to control the form of action, either by pleading or otherwise asserting "personal capacity," is contrary to the admonition of this Court in *Will* that the immunity of a state officer from liability for damages for acts performed in the officer's official capacity should not be circumvented by a mere pleading device. 109 S.Ct. at 2311.

As previously noted, only six of the sixteen respondents expressly alleged that they were suing Hafer for damages in her personal capacity and the remaining respondents have never sought leave to amend their complaints to assert personal conduct. That failure by ten of the respondents to allege *personal* capacity is sufficient to justify the conclusion that their actions were against Hafer in her *official* capacity. *Wells v. Brown*, 891 F.2d 591, 593 (6th Cir. 1989).

#### NOTES (Continued)

As this Court has noted, although the debate relating to the 1871 Act was vigorous, *Will*, 491 U.S. at 68, 109 S.Ct. at 2310, it mainly concerned the other sections of the statute, not Section 1, which was subject to only limited debate and was passed without amendment. *Monell*, 436 U.S. at 665, 98 S.Ct. at 2023. The complaints referred to in *Will* to the effect that Section 1 would subject state officers to damage liability, *Cong. Globe*, 42d Cong., 1st Sess. 366, 385 (1871), were expressed by opponents to the legislation (William Barker, Dem. Ky.; Joseph H. Lewis, Dem. Ky.), and in all events do not state the circumstances under which liability could be imposed.

### III. Hafer Should Not, as a Matter of Policy, Be Subject to Liability for Damages Under 42 U.S.C. §1983 for Exercising Her Responsibility Under State Law To Hire and Fire Employees.

The decision of the Court of Appeals that Hafer is liable for damages for exercising her official duties in hiring and discharging employees also contravenes one of the principal purposes of the Eleventh Amendment, *i.e.*, to preserve the sovereignty of the States by restricting the exercise of federal judicial power over the States and state officials. *Employees of the Dept. of Public Health and Welfare v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 287, 293-94, 93 S.Ct. 1614, 1619, 1622-23 (1973) (Marshall, J., concurring); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 88, 99-100, 104 S.Ct. 900, 907 (1987). These considerations of federalism are particularly critical in matters, such as the instant one, arising out of acts taken by an elected executive officer in the operation of the State's governmental affairs. Certainly the hiring and firing of employees is an integral part of the operation of a state government and that function can only be performed by the elected and appointed state officials responsible for those functions.

When state officers are *sued* in their *personal* capacity for *acts* taken in their *official* capacity, they are required to undergo heavy expenditures of personal funds to defend their conduct on behalf of the State even though they may prevail on the merits. As a consequence, the possibility that state officers will be required to litigate personal damage claims against themselves in their personal capacity for exercising, on behalf of the State, their official functions necessarily will have a chilling effect upon their good faith efforts to maintain the high standards of employment practices necessary for efficient management and will interfere with the operation of the state governments. It will also have the deleterious effect of discouraging qualified candidates from running for public office or accepting appointment thereto and could cause incumbents to hesitate to exercise their authority to discharge employees even under the egregious circumstances as existed in the instant matter where there is a discovery by the federal authorities of an invidious job-buying

scheme involving employees of the state's governmental unit entrusted with the responsibility of overseeing and safeguarding the receipt and expenditure of state funds.

There is, moreover, no overriding need to penalize a state officer to remedy any alleged deprivation of federal rights which may occur by reason of authorized conduct in the course of internal management of state government. Adequate prospective relief, such as reinstatement, is available under present law in the form of an official capacity action against the state officer. Damages for alleged deprivation of civil rights should be payable, if at all, by the State, *not the official capacity actor*, and Congress has the power to enact legislation limiting the effect of the Eleventh Amendment and expressly providing monetary relief from the State for violation of the Fourteenth Amendment to the United States Constitution, if that remedy is deemed necessary. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666 (1976).

### CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit entered August 21, 1990, should be reversed and the matter remanded to the Court of Appeals for affirmance of the Order of the United States District Court for the Eastern District of Pennsylvania, dated September 28, 1989, granting Hafer's Motion for Summary Judgment and dismissing respondents' consolidated actions against Hafer.

Respectfully submitted,

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No. 90-681

Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

BARBARA HAFFER,

*Petitioner*

v.

JAMES C. MELO, JR. AND CARL GURLEY, ET AL.,

*Respondents*

**BRIEF FOR RESPONDENTS**

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## BRIEF FOR RESPONDENTS

### COUNTERSTATEMENT OF THE CASE

#### I. PRELIMINARY

Several documents which are not technically part of the record, and therefore not in the Joint Appendix, may be relevant to the disposition of this appeal. Respondents therefore have lodged with the Clerk's Office the following:

1. Respondents' Brief filed in the District Court in opposition to Petitioner's Motion for Summary Judgment.

2. Arbitration Award of December 29, 1989 (Respondent Danowitz).



3. Arbitration Award of December 15, 1989 (Respondent Weikel).

4. Arbitration Award of March 8, 1990 (Respondents DiCosimo and Jurik).

5. Affirmance of Arbitration Awards by Commonwealth Court of Pennsylvania, Opinion and Orders of November 7, 1990.

In addition, the Joint Appendix does not include documents previously included in the Appendices to the Petition for Writ of Certiorari and Answer. Respondents will cite these documents as "PA" (Petition Appendix) and "AA" (Answer Appendix).

## II. COUNTERSTATEMENT

Petitioner's Statement of the Case refers to numerous materials which were not considered by either the Court of Appeals or the District Court. Specifically, petitioner's recitation of the underlying facts is taken from her self-serving Declaration and the exhibits to that Declaration. (JA 64-168).

Petitioner did not file a Motion to Dismiss either the Melo or Gurley Complaints. However, the District Court wished petitioner to file a dispositive pre-trial motion (Respondent's District Court Brief, Pages 1-2) and by Order of July 14, 1989 deferred discovery and directed petitioner to file a Motion for Summary Judgment (JA 1). Respondents objected to a summary judgment proceeding because discovery was not complete and in fact no depositions had yet been taken. (Respondents' District Court Brief, Pages 2-3, PA 11-12).<sup>1</sup> However, respondents' objections were rendered moot by the disposition of the District Court. The District Court decided petitioner's Motion solely upon the facts pleaded in the Complaints without any reference whatsoever to the factual material contained in petitioner's self-serving Declaration. (PA 36-37).

1. The three Arbitration Awards and the exhibits submitted by respondents in their Answer to petitioner's Motion (JA 174-257) indicate what facts respondents might have been able to prove had they been given an opportunity to pursue discovery.

The Court of Appeals treated petitioner's Motion as a Motion to Dismiss and, like the District Court, decided the case based upon the allegations in the Complaints. (PA 10-13).

With respect to the Melo respondents, their Complaints allege the following:

The Melo respondents were employed by the Commonwealth of Pennsylvania in the Office of the Auditor General in low-level positions where party affiliation was neither a necessary nor appropriate requirement for performance of their duties.<sup>2</sup> (JA 8). During the term of petitioner's predecessor, Auditor General Donald Bailey, an investigation was conducted with regard to certain allegations made by John Kerr, a former employee in the Office of the Auditor General and a convicted felon. Kerr had alleged that he had received payments to influence either the employment or promotion of 21 other employees, including the eight Melo respondents. However, Mr. Bailey's investigation disclosed no evidence of wrong-doing by any of the Melo respondents. (JA 8-9)

Bailey, a Democrat, ran for re-election in 1988. His Republican opponent was Hafer. All of the Melo respondents are Democrats. One of Hafer's key campaign issues was that Bailey should have fired the 21 employees identified by Mr. Kerr. Hafer characterized these employees as having "bought their jobs" and made a campaign promise that, if elected, she would fire them. (JA 9-10).

Hafer won the election. Immediately after her inauguration, she fired 18 employees, including the eight Melo respondents, and made public statements throughout the Commonwealth that she was firing people who bought their jobs. Hafer stated publicly that the 18 fired employees paid up to \$5,000.00 each for their jobs under a previous administration. (JA 10-11).

Even though Hafer summarily fired the Melo respondents, she did not conduct any investigation into their actual involvement in a job-buying scheme and did not have any more

2. 7 of the 8 Melo plaintiffs were union members whose employment was subject to a collective bargaining agreement. Non-union employees were subject to the Policy and Procedures Manual of the Office of the Auditor General.

information in her possession than Mr. Bailey had when he previously exonerated the Melo respondents. Hafer's motivation in firing the Melo respondents was purely political and in no way based upon respondents' job performance.<sup>3</sup> The Melo respondents were fired without cause, without a hearing, without a reasonable pre-firing investigation and without procedural or substantive due process. (JA 12-13). Such an abusive firing was also a violation of the collective bargaining agreement and the Policy and Procedures Manual of the Office of the Auditor General. (JA 11-13). It was established Commonwealth policy that both union and non-union employees could not be fired without just cause. (JA 191-193).

The allegations of the Gurley plaintiffs are set forth in three separate Complaints, the most complete of which is the Brennan Complaint at JA 37-55. The Gurley plaintiffs allege that they were long-time employees of the Commonwealth of Pennsylvania in the Office of the Auditor General and that they were at low-level positions where party affiliation was neither a necessary nor appropriate requirement for effective performance of their duties.<sup>4</sup> All performed their duties in a satisfactory manner and received promotions and good job ratings. (JA 38).

Like the Melo plaintiffs, the Gurley plaintiffs were summarily discharged by Ms. Hafer shortly after she was inaugurated. (JA 39). The Gurley plaintiffs were fired because of their political association with and support for Mr. Bailey, the incumbent whom Ms. Hafer defeated in the November 1988 election for Auditor General. (JA 46). The Gurley plaintiffs were given no reason for their discharge, were not discharged because of unsatisfactory job performance and their discharge was in violation of the Policy and Procedures Manual of the Office of the Auditor General. (JA 39-41).

The Commonwealth of Pennsylvania was not named as a defendant in any of the Melo or Gurley Complaints. (JA 7, 26,

3. Hafer's motivation was twofold. First, the Melo respondents were all Democrats. Second, Hafer had made a campaign promise to fire them and she desired to fulfill that campaign promise and achieve maximum political publicity. (JA 12-13). Hafer ran for governor (unsuccessfully) in the November 1990 election.

4. None of the Gurley respondents were union employees.

33, 37). The caption of each Complaint names as a defendant "Barbara Hafer" but does not identify her as an officer of the Commonwealth. The Commonwealth did not receive notice of the suits nor was the Commonwealth given an opportunity to respond. (AA 44-49). The Complaints do not seek any monetary damages from the Commonwealth of Pennsylvania. None of the Complaints allege that the Commonwealth was the moving force behind the deprivation of respondents' civil rights or that the Commonwealth's policy or custom played a part in the civil rights violations. To the contrary, the Complaints allege that Hafer's actions were in violation of the collective bargaining agreement (for union employees) and the Policy and Procedures Manual (for non-union employees).

In her Answers to the Complaints, Hafer asserted the affirmative defense of qualified immunity. (JA 24, 32).

Petitioner's Statement of the Case at Page 5, Footnote 6, refers to arbitration hearings conducted on grievances filed by seven union Melo respondents. The arbitrators overruled Hafer, and ordered all seven respondents reinstated. The arbitrators found that Hafer exceeded her authority because the Melo respondents were truly innocent of any misconduct and Hafer could not fire them without "cause".<sup>5</sup> The Arbitrators' Awards were affirmed by the Commonwealth Court of Pennsylvania.

The District Court dismissed both the Melo and Gurley Complaints on the theory that Hafer was acting in her official capacity when she fired respondents and that state officials acting in their official capacity are not "persons" within the meaning of 42 U.S.C.A. §1983. The Court of Appeals reversed holding that the claims against Hafer for monetary damages

5. Arbitrator Anderson found that:

"Even under a speculative test of reasonableness the employee should at least have been given notice of the charges against them and an opportunity to respond. However, the record shows this was not done by the new administration. The conduct of the Auditor General (Hafer) in summarily dismissing the employee without any investigation by her or her staff, as promised in her campaign, is totally inexcusable under any test of reasonableness and certainly not under the contract test of just cause." See Page 18 of Arbitration Award of March 8, 1990 (DiCosimo and Jurik).



were claims made against her in her personal capacity and therefore cognizable under §1983. The Court of Appeals found that the Complaints did indicate that all respondents were proceeding against Hafer for monetary damages in her personal capacity and, in any event, respondents so stated to the District Court in opposing Hafer's Motion. (PA 16-17). Respondents' Brief filed in the District Court states at Page 23:

"The mere fact that Barbara Hafer is the official who has the power to fire people in her department does not mean that every firing is an act of official policy which permits Ms. Hafer to cover herself in the cloak of the Eleventh Amendment. More importantly, *Scheuer* clearly holds that the nature of the allegations made in the Complaint determine whether the plaintiff is pursuing a personal capacity or official capacity cause of action. If plaintiff was pursuing an official capacity cause of action, it would be necessary, as stated in *Kentucky vs. Graham*, to allege that the entity was the moving force and that the act which violated his civil rights was a policy or custom of the entity. No such allegations appear in the Complaint. Plaintiffs have not alleged that the Commonwealth was a moving force in the violation of their civil rights or that what Ms. Hafer did was policy or custom. *Plaintiffs are pursuing a personal capacity suit for monetary damages and it is plaintiffs' contentions and plaintiffs' allegations that control.* If the plaintiffs wish to pursue the monetary damage claim against Ms. Hafer on a personal capacity basis only and draft the Complaint in support of that position, the defendant cannot insert into the Complaint official capacity allegations which are simply not there (and which are also untrue)." (Emphasis supplied).

### SUMMARY OF ARGUMENT

The Eleventh Amendment provides no shield for a state official confronted by a claim that he personally has deprived another of federal rights under color of state law. *Scheuer vs. Rhoads*, 416 U.S. 232 (1974). As long as the state official is the actual tortfeasor and as long as monetary damages are sought

from the official's private purse and not the public treasury, the state is not a party to the action and the action is not barred by the Eleventh Amendment.

The doctrine of limited qualified immunity prevents civil rights suits from becoming an unwarranted intrusion upon the executive branch of government. *Scheuer; Harlow vs. Fitzgerald*, 457 U.S. 800 (1982). In civil rights actions against both federal and state defendants, government officials performing discretionary functions will be immune from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

The Melo and Gurley respondents have pleaded a "personal capacity" suit under *Kentucky vs. Graham*, 473 U.S. 159 (1985). Respondents do not seek any money from the Commonwealth. They do not allege that the Commonwealth was the moving force behind the deprivation of their civil rights or that the Commonwealth's policy or custom played a part in such violation. To the contrary, they allege that petitioner exceeded her authority under the collective bargaining agreement and the Policy and Procedures Manual. The Commonwealth did not receive notice of the law suits nor was the Commonwealth given an opportunity to respond. It was Hafer who violated the civil rights of the Melo and Gurley respondents and it is from Hafer's private purse that monetary damages were sought.

As a general rule, the plaintiff determines whether the law suit will be a personal or official capacity law suit. It is the plaintiff who pleads whether the government entity was the "moving force" behind the deprivation. It is the plaintiff who chooses whether to pursue the public treasury or a private purse. Once the plaintiff makes his choice known, plaintiff's decision controls. *Brandon vs. Holt*, 469 U.S. 464 (1985). Respondents did not allege in their Complaints the sine qua non of an official capacity law suit — that the entity was the moving force behind the deprivation — and respondents never sought damages from the Commonwealth. Further, in response to petitioners' Motion for Summary Judgment, respondents advised the District Court that they were pursuing a personal capacity law suit.



If a civil rights action is not barred by the Eleventh Amendment, then a state official sued in his or her personal capacity is a "person" within the meaning of §1983. *Howlett vs. Rose*, 110 S.Ct. 2430 (1990). It is only when an individual has Eleventh Amendment immunity that he or she is not a "person" under §1983. Hafer does not have Eleventh Amendment immunity and therefore she is a "person" under §1983.

## ARGUMENT

### I. RESPONDENTS' CLAIMS AGAINST PETITIONER ARE NOT BARRED BY THE ELEVENTH AMENDMENT.

The Auditor General of Pennsylvania is an elected office which serves as a financial watchdog for receipts and disbursements from the state treasury. However, the individuals who work within the Department of the Auditor General are employed by the Commonwealth of Pennsylvania. Some are union members and the terms of their employment are governed by a collective bargaining agreement. Non-union employees are subject to the Department's Policy and Procedures Manual which provides the terms under which an employee may be disciplined or dismissed. It was established Commonwealth policy that both union and non-union employees within the Auditor General's Department could not be fired without just cause. (JA 191-193).

Respondents were fired without just cause and for purely political reasons. The Gurley respondents were all supporters of the incumbent Auditor General, Donald Bailey, whom Hafer defeated in the 1988 election, and were fired for that reason. The Melo respondents were fired because they were Democrats and because Hafer had made a campaign promise to fire them. Hafer fulfilled that promise in such a way as to reap the maximum political publicity. Political publicity was important to Hafer; she was the (unsuccessful) Republican candidate for governor in 1990.

In *Scheuer vs. Rhoads*, 416 U.S. 232 (1974) the Court decided that a high state official (the governor of Ohio) could be sued personally for damages by victims of a civil rights tort where the official himself committed the tort. In *Scheuer*, Governor Rhoads was accused of willfully and wantonly causing an unnecessary deployment of the Ohio National Guard on the Kent State campus and ordering the guard members to perform illegal actions which resulted in the deaths of several students. This conduct was obviously taken in Governor Rhoads' official capacity because he would be the commander-in-chief of the

Ohio National Guard. Similarly, Governor Rhoads would have substantial discretion in deployment of the Ohio National Guard.

The issue in *Scheuer* was whether the Eleventh Amendment barred a civil rights claim against Governor Rhoads for monetary damages to be collected from him personally. The Court allowed the claim and held that where Governor Rhoads personally caused a deprivation of civil rights and where damages were sought from Governor Rhoads' private purse, the State of Ohio was not a party to the litigation and the Eleventh Amendment did not bar the claim. The Court stated:

"It is well established that the (Eleventh) Amendment bars suits not only against the State when it is the named party but also when it is the party in fact . . . . However, since *Ex parte Young* . . . . it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law. *Ex parte Young* teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he 'comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity for responsibility to the supreme authority of the United States.'" (Page 237) (Emphasis not supplied)

The Court in *Scheuer* then went on to explain that where the plaintiff is seeking damages from the public treasury, the Eleventh Amendment is a complete bar to a §1983 claim. The Court stated:

"While it is clear that the doctrine of *Ex parte Young* is of no aid to a plaintiff seeking damages from the public treasury, *Edelman vs. Jordan*, supra . . . ., damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office . . . . In some situations a damage remedy can

be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another." (Page 238)

The essence of *Scheuer* is that a state official who commits a civil rights tort may be called upon to respond in damages to his victim as long as the award is not paid out of the public treasury. *Scheuer* is authority for respondents' claims. Hafer committed a civil rights tort and respondents, the victims, do not seek compensation from the public treasury.

*Scheuer* also addressed the concern that civil rights suits against high state officials would unreasonably interfere with state government. The Court established a qualified immunity and rejected the concept that a high executive official should have an absolute immunity. The Court stated:

"Under the criteria developed by precedents of this Court, §1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer have 'the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.'" (Page 248)

The doctrine of qualified immunity for high officials in the executive branch was ultimately defined in *Harlow vs. Fitzgerald*, 457 U.S. 800 (1982). In *Harlow*, the Court again rejected a claim for absolute immunity and stated:

"We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (Page 817)

Although *Harlow* involved a civil rights claim against federal officials, the Court stated that the test for qualified immunity would be the same as under §1983 and cited *Scheuer* as the source decision for qualified immunity of executive officials. (Page 807-9). *Harlow* also re-stated the justification for rejection of absolute immunity and the importance of damages actions as a vehicle to vindicate federal rights:

"The greater power of high officials . . . . affords a greater potential for a regime of lawless conduct . . . . Damages actions against high officials were therefore 'an important means of vindicating constitutional guarantees.'" (Page 808)

In *Scheuer*, the Court drew the distinction between a personal capacity law suit and an official capacity law suit. In *Kentucky vs. Graham*, 473 U.S. 159 (1990), the Court further defined this distinction and stated:

"Proper application of this principle in damages actions against public officials requires careful adherence to the distinction between personal and official capacity action suits. Because this distinction apparently continues to confuse lawyers and confound lower courts, we attempt to define it more clearly through concrete examples of the practical and doctrinal differences between personal and official capacity actions." (Page 165)

The Court then set forth the following criteria:

1. A personal capacity suit seeks to impose personal liability upon a government official for actions taken by the government official under color of state law.

2. An official capacity suit is generally only another way of pleading an action against the governmental entity of which the official is an agent.

3. In an official capacity law suit, the government entity is the real party in interest. An award of damages in such a suit can be collected from the government entity only. An award of damages in a personal capacity law suit can be collected only from the official's personal assets.

4. To establish liability in a personal capacity law suit, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.

5. In an official capacity law suit, the plaintiff must plead and prove that the entity was the moving force

behind the deprivation and that the entity's policy or custom played a role in the violation of federal law.

6. In a personal capacity law suit, the official may assert the personal immunity defenses such as qualified immunity where applicable and absolute immunity where applicable. In an official capacity law suit, these defenses are unavailable.

7. In an official capacity law suit, the only immunities which can be claimed as a defense are such forms of sovereign immunity as the entity, qua entity, may possess such as the Eleventh Amendment.

The above criteria were established in 1985. When the instant law suits were filed in 1989, they were governed by *Graham*. None of the Complaints filed by the Melo or Gurley respondents alleged that the Commonwealth was a moving force behind the deprivation of their civil rights or that the Commonwealth's policy or custom played a part in the violation of federal law. To the contrary, all respondents alleged that Hafer violated the Commonwealth's policy or custom with respect to firing for cause and that Hafer exceeded her authority under both the collective bargaining agreement and the Policy and Procedures Manual.

Respondents did not name the Commonwealth as a defendant nor did they sue Hafer in her official capacity as Auditor General of Pennsylvania. No damages were sought from the Commonwealth and the Commonwealth was not served with a copy of Complaint. All of the Complaints identified Hafer personally as the civil rights tortfeasor and it was Hafer's personal conduct that was alleged to have caused the deprivation of respondents' civil rights. Hafer obviously understood that she was being sued in her personal capacity because she pleaded qualified immunity as an affirmative defense.

The Melo Complaints do not use the words "personal capacity". However, they plead sufficient facts to establish Hafer's personal liability for a civil rights tort and do not plead the facts necessary under *Graham* to establish the liability of the Commonwealth. In addition, the Melo respondents seek only



monetary damages and therefore would be completely out of court under the Eleventh Amendment if they were pursuing Hafer in her official capacity. *Edelman vs. Jordan*, 415 U.S. 651 (1974). It would not be reasonable to interpret a pleading so as to render it ineffective on its face. Under the law as it existed at the time the Melo Complaints were filed, the Melo respondents pleaded only a personal capacity law suit.

With respect to the Gurley respondents, the Complaints filed in Gurley and Best are analogous to the Melo Complaint. The Complaints filed by Brennan, et al. do identify personal capacity versus official capacity claims and make it clear that all monetary damage claims are sought against Hafer in her personal capacity while claims for prospective relief (reinstatement) are made against Hafer in her official capacity as the titular head of the Department of the Auditor General.

In *Brandon vs. Holt*, 469 U.S. 464 (1985), the Court was presented with an ambiguous pleading with regard to whether it asserted a personal or official capacity §1983 claim against a municipal official. The Court resolved the ambiguity by reference to post-pleading conduct. The Court stated:

"The course of proceedings after *Monell* was decided did, however, make it abundantly clear that the action against Chapman was in his official capacity and only in that capacity. Thus, in petitioners' response to a defense Motion for Summary Judgment, petitioners' counsel stated:

'Chapman is sued in his official capacity as Director of Police Services, City of Memphis, Tennessee. Official capacity suits generally represent an action against an entity of which an officer is an agent . . . . *Monell vs. New York Department of Social Services*, . . . ' " (Page 469-470)

Because the course of proceedings made is clear that plaintiff was pursuing an official capacity law suit, the Court went on to state:

"Given this state of the record, even at this late stage of the proceedings, petitioners are entitled to amend their pleadings to conform to the proof and to the district court's

findings of fact. Moreover, it is appropriate for us to proceed to decide the legal issues without first insisting that such a formal amendment be filed; this is because we regard the record as plainly identifying petitioners' claim for damages as one that is asserted against the office of the 'Director of Police, City of Memphis' rather than against the particular individual who occupied that office when the claim arose. Petitioners are claiming a right to recover damages from the City of Memphis." (Page 471)

Respondents' post-pleading conduct removes any possible ambiguity that they were proceeding against Hafer in her personal capacity. Respondents advised the District Court, in response to Hafer's Motion for Summary Judgment, that they were proceeding against Hafer in her personal capacity. Respondents' Brief in Opposition to Hafer's Motion states:

"Plaintiffs are pursuing a personal capacity suit for monetary damages and it is plaintiffs' contentions and plaintiffs' allegations that control." (Page 23 of Brief)

The Circuit Court understood that Hafer was being sued in her personal capacity and further found that respondents had made it abundantly clear to the District Court that they were proceeding in a personal capacity law suit. The Circuit Court stated:

"As we noted above, these Gurley plaintiffs were explicit that their monetary claims were asserted against Hafer in her individual capacity. The remaining Gurley plaintiffs and the Melo plaintiffs, although not as explicit, signified a similar intent because the captions in the Complaints only listed 'Barbara Hafer' and not the Commonwealth of Pennsylvania, as a defendant, and only request damages from Hafer and not from the state. It appears that Hafer understood that plaintiffs sought to sue her in her personal capacity because she raised the defense of qualified immunity throughout the course of the proceedings, a defense available only for government officials when they are sued in their personal, and not their official, capacity . . . . Moreover, once plaintiffs explained to the District Court

that they sued Hafer for damages in her individual capacity, they should have been given leave to amend to so assert with specificity, if there was any remaining ambiguity about the issue." (PA 16)

Respondents' pleadings and post-pleading conduct presented personal capacity civil rights claims for damages against Hafer under the tests established in *Scheuer*, *Graham* and *Brandon*. Therefore, respondents' claims are not barred by the Eleventh Amendment.

## II. IF THE ELEVENTH AMENDMENT DOES NOT BAR RESPONDENTS' CLAIMS, HAFER IS A PERSON WITHIN THE MEANING OF 42 U.S.C. §1983.

In *Howlett vs. Rose*, 110 S.Ct. 2430 (1990), the Court in a unanimous opinion interpreted the meaning of its decision in *Will vs. Michigan*, 491 U.S. 58 (1989), 109 S.Ct. 2304. The Court stated:

"As we held last Term in *Will vs. Michigan Department of State Police* . . . . an entity with Eleventh Amendment immunity is not a 'person' within the meaning of §1983. The anomaly identified by the State Supreme Court, and by the various state courts which it cited, that a State might be forced to entertain in its own courts suits from which it was immune in federal court, is thus fully met by our decision in *Will*. *Will* establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under §1983 in either federal court or state court." (Page 2437)

Therefore, the essence of *Will* is whether the defendant is deemed to be the state or an arm of the state. If so, such defendant would enjoy Eleventh Amendment immunity from a §1983 action and cannot be sued in either federal or state court.

When sued in her personal capacity for civil rights torts which she personally committed, Hafer is neither the state nor an arm of the state. She is not an entity which enjoys Eleventh Amendment immunity and therefore she remains a "person" within the plain meaning of §1983.

Hafer seeks to avoid liability for the violation of respondents' civil rights which she personally committed by asserting that she was "acting" in her official capacity when she terminated the employment of all respondents without cause and for purely political reasons. However, the term "acting in official capacity" is really no different than "acting under color of state law". The fact that the defendant is a state official and acts in that capacity is what gives the conduct the "color" of state law.

"Indeed, as Justice Frankfurter once noted during the seventy years which followed the enactment of the original Civil Rights Act of 1866, every case before the Supreme Court in which the 'color of state law' provisions were invoked 'involved action taken either in strict pursuance of some specific command of state law or within the scope of executive discretion in the administration of state laws'." *Farid vs. Harold J. Smith, Superintendent of Attica Correctional Facility*, 850 F.2d 917, 921 (2nd Cir. 1988).

Governor Rhoads was obviously acting in his official capacity when he deployed the National Guard. Nevertheless, he would have personal liability for a civil rights tort which he personally committed and where the award would not be paid out of the state treasury. Similarly, in *Graham*, the Commissioner of Kentucky State Police, Mr. Brandenburg, the highest ranking law enforcement officer of Kentucky, would have been acting in his official capacity when he directed a raid which allegedly caused a violation of Mr. Graham's civil rights. Although Mr. Brandenburg was acting in his official capacity at the time of the violation, he was sued in his personal capacity for a civil rights tort which he personally committed.

In addition, *Brandon*, holds that plaintiffs may choose whether to pursue a §1983 defendant personally or in an official capacity. Respondents have made their choice both by the nature of their pleadings and by specifically so stating to the District Court in response to Hafer's Motion for Summary Judgment.

Hafer seeks to draw a distinction between acts of state officials "under color of state law" which are outside the official's authority or which are not essential to the operation of state



government and acts of the same officials which are within the official's authority and necessary to the performance of state governmental functions. Hafer argues that the latter acts are immune from liability under §1983 and that civil rights victims are limited to redress for violations which occur outside the official's authority and which are not essential to the operation of state government.

In *Scheuer*, Governor Rhoads was acting within his authority when he deployed the National Guard. In addition, deployment of the National Guard would be conduct essential to the operation of state government. Nevertheless, he would have been held personally liable if he committed a civil rights tort.

In *Graham*, Mr. Brandenburg was acting within his authority when he directed police activity at the Graham residence. Further, law enforcement is clearly essential to the operation of state government. Nevertheless, Mr. Brandenburg had personal liability for the civil rights tort he committed upon the Graham family.

Where executive state officials are acting within their authority and performing functions necessary for state government, they are given a qualified immunity. *Scheuer*; *Harlow*. This immunity adequately protects state government from being disrupted by civil rights law suits. The reason given for the doctrine of qualified immunity was well stated in *Scheuer*:

"The public interest requires decisions and action to enforce laws for the protection of the public . . . . 'It is not a tort for the government to govern.'" (Page 241)

It is only when state government officials transgress civil rights that are "clearly established statutory or constitutional rights of which a reasonable person would have known" that they incur liability.

Hafer seeks an absolute immunity. However, the law is well-established that high state executive officials are not entitled to absolute immunity. The Court stated in *Forrester vs. White*, 484 U.S. 219 (1988):

"Among executive officials, the President of the United States is absolutely immune from damages liability arising

from official acts... This immunity, however, is based on the President's 'unique position in the constitutional scheme,' . . . and it does not extend indiscriminately to the President's personal aides, . . . or to cabinet level officers. Nor are the highest executive officials in the States protected by absolute immunity under federal law. See *Scheuer v. Rhodes*, supra." (Page 225).

In *Forrester*, the Defendant was a State court judge who fired a probation officer because she was female. The Defendant argued that the conduct of judges was subject to absolute immunity. However, the court held that hiring and firing is an administrative function only to which qualified immunity applied. The court stated:

"In the case before us, we think it clear that Judge White was acting in an administrative capacity when he demoted and discharged Forrester. Those acts—like many others involved in supervising court employees and overseeing the efficient operation of a court—may have been quite important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative. As Judge Posner pointed out below, a judge who hires or fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys, or indeed from any other executive branch official who is responsible for making such employment decisions. Such decisions, like personnel decisions made by judges, are often crucial to the efficient operation of public institutions (some of which are at least as important as the courts), yet no one suggests that they give rise to absolute immunity from liability in damages under Section 1983." (Page 545). (Emphasis supplied.)

Hafer's conduct in firing respondents was administrative. Executive branch officials, like judicial officials, who make employment decisions have never received absolute immunity. In addition, *Forrester* is an example of a *Scheuer*-type personal capacity lawsuit where a state official was held personally liable



to his victim for a civil rights tort where the official was the tortfeasor and no damages were sought from the public treasury.

Hafer's contention that she was acting within her authority is not only irrelevant, it is factually incorrect. Hafer did exceed her official authority when she fired respondents. Both the union and non-union respondents could not be fired except for cause. Hafer has already been forced to re-hire the union respondents. Hafer abused her office and terminated respondents' employment for reasons that were beyond the scope of her authority and were personal to her, i.e., partisan politics.

Hafer hangs her hat on one sentence in the *Will* Opinion, to wit:

"We hold that neither a state nor its officials acting in their official capacities are persons under §1983." (Page 71)

Hafer argues that this one sentence overrules *Scheuer*, *Graham* and *Brandon*. However, Hafer has taken the sentence out of context. The sentence is preceded by the following:

"Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon vs. Holt* . . . . As such, it is no different from a suit against the state itself. See e.g. *Kentucky vs. Graham*, . . . *Monell* . . . . We see no reason to adopt a different rule in the present context, particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device." (Page 71)

It is obvious from the above quotation that *Will* was not intended to overrule *Graham*, *Brandon* or *Scheuer*. Instead, the correct interpretation of *Will* was stated by a unanimous court in *Howlett* as follows:

"As we held last Term in *Will vs. Michigan* . . . . an entity with Eleventh Amendment immunity is not a 'person' within the meaning of §1983. The anomaly identified by the State Supreme Court, and by the various state courts which it cited, that a State might be forced to entertain in its own courts suits from which it was immune in federal court, is

thus fully met by our decision in *Will*. *Will* establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under §1983 in either federal court or state court." (Page 2437)

The correct interpretation of *Will* is simply that an entity (or individual) with Eleventh Amendment immunity is not a "person" within the meaning of §1983.

It does not appear from the *Will* opinion that *Will* sued the person who actually violated his civil rights. *Will* sued the "Department of State Police" and the "Director of State Police in his Official Capacity". *Will* did not identify any person as the actual perpetrator of a civil rights tort and did not sue any state official in his or her personal capacity. Once *Will* identified his suit as an official capacity suit, it followed under *Graham* that *Will* was actually suing the State of Michigan. The majority in *Will* therefore reasoned that if the State of Michigan enjoyed Eleventh Amendment immunity in a §1983 action in federal court, it would be anomalous for *Will* to be allowed to pursue the same cause of action in state court, especially where the legislative history of §1983 indicated that Congress contemplated that the federal courts would be the primary forum for §1983 actions.

The doctrine that a high state official who commits a civil rights tort can be held personally accountable in damages to his victim has been well-established since 1974 in *Scheuer*. *Scheuer* was a unanimous decision of the eight justices who participated. *Scheuer* was cited with approval in *Graham* (Page 165) and *Graham* was also a unanimous decision. *Graham* also cited with approval *Brandon* (Pages 164, 166). *Brandon* was a 7-2 decision with one concurrence and one dissent.<sup>6</sup> The *Forrester* decision in 1988 followed *Scheuer* and there were no dissents.

6. The dissent of Justice Rehnquist dealt largely with the issue of whether damages could be collected from a government entity where the caption identified the defendant as the police commissioner acting in his official capacity and not the government entity. This issue is not present in the instant case because damages are sought from Hafer and Hafer is a named defendant in the caption.

The doctrine of stare decisis is strongest when the Court confronts its previous constructions of legislation. As stated by Mr. Chief Justice Rehnquist in his dissent in *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978):

"As this Court has repeatedly recognized . . . *Edelman vs. Jordan*, 415 U.S. 651 . . . , considerations of stare decisis are at their strongest when this court confronts its previous constructions of legislation. In all cases, private parties shape their conduct according to this Court's settled construction of the law, but the Congress is at liberty to correct our mistakes of statutory construction, unlike our constitutional interpretations, whenever it sees fit . . . Only the most compelling circumstances can justify this Court's abandonment of such firmly established statutory precedence." (Page 714-15)

Applying the doctrine of stare decisis to *Scheuer, Graham, Brandon* and *Forrester*, this Court should not depart from the well-established doctrine that a state official bears personal responsibility for his civil rights torts when sued in his personal capacity. The official is given ample protection by the doctrine of qualified immunity. Executive state officials are not entitled to absolute immunity, especially when performing the administrative function of hiring and firing.

## CONCLUSION

The Circuit Court correctly held that Hafer was sued in her personal capacity for a civil rights tort which she herself committed and that no damages were sought from the state's public treasury. Therefore, Hafer does not enjoy Eleventh Amendment immunity and is a person under 42 U.S.C. §1983. The Circuit Court should be affirmed.

Respectfully submitted,

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1990

BARBARA HAFFER,

*Petitioner*

v.

JAMES C. MELO, JR. AND CARL GURLEY, ET AL.,

*Respondents*

On Writ of Certiorari to the United States Court  
of Appeals for the Third Circuit

**REPLY BRIEF FOR THE PETITIONER**

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**REPLY BRIEF FOR THE PETITIONER**

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Petitioner Barbara Haer ("Haer") hereby replies to the briefs on the merits filed herein by respondents and by *amici curiae* who support respondents.<sup>1</sup>

**ARGUMENT**

**I. *Will v. Michigan Dept. of State Police* Expressly Holds That State Officials Acting in Their Official Capacities Are Not Subject to Liability Under 42 U.S.C. §1983.**

---

1. *Amicus curiae* briefs in support of respondents have been filed on behalf of Nancy Haberstroh, Ph.D.; American Civil Liberties Union and the ACLU of Pennsylvania; American Federation of Labor and Congress of Industrial Organizations; and Kenneth W. Fultz. A number of national, state and local governmental associations have joined in an *amicus curiae* brief in support of petitioner.



Nothing in the briefs of respondents and the *amici curiae* refutes the primary basis for Hafer's position;<sup>2</sup> that in *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989), this Court expressly held that state officials *acting* in their official capacities are not "persons" under 42 U.S.C. §1983. Respondents maintain that §1983 plaintiffs may circumvent *Will* and subject state officials to personal liability for damages under that statute by the simple expedient of describing such an action as one against the officials in their personal capacities, *even if the acts alleged could only be performed by the officials acting in their official capacities*.

The limitation established by *Will* on the susceptibility of state officials to liability under 42 U.S.C. §1983 cannot be avoided by such a transparent stratagem. Although the complaint in *Will* did designate the Director of State Police as being sued in his official capacity, the Supreme Court of Michigan, in reversing the decision of the Michigan Court of Appeals that the Director of State Police was subject to liability under 42 U.S.C. §1983, squarely stated that state officials *acting* in their official capacities are not "persons" within the meaning of §1983. This Court affirmed, using exactly the same terminology: "We hold that neither a State nor its officials acting in their official capacities are persons under §1983." The sole reference in both opinions is to the nature of the *acts*, not to the form of the *action*. The principal question raised by these proceedings therefore is what this Court meant by the phraseology "acting in their official capacities."

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2. Although the primary force of Hafer's argument is that she was acting in her official capacity in discharging respondents and is therefore not a "person" subject to liability under 42 U.S.C. §1983 pursuant to *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), notwithstanding respondents' attempt to characterize their actions as "personal capacity" law suits, Hafer has never conceded that respondents properly pleaded such an action. It is Hafer's position that, by reason of *Will*, it is the nature of the state official's conduct giving rise to the claim which governs whether an action is a "personal capacity" action, and not plaintiff's characterization thereof. At the very least, respondents' failure to assert in ten of their eleven complaints that Hafer was being sued in her personal capacity precludes their present contention as to the nature of the actions set forth in those complaints. See Brief of the National Association of Counties, et al., filed in support of petitioner.

The words, "*acting in their official capacities*," which the Court used to determine whether a state official is a "person" under 42 U.S.C. §1983, are not the same as the terminology "*acting under color of state law*," which governs whether a person is subject to liability under the statute and appears to be of more limited scope. Thus, a state official engaged in conduct "*under color of state law*" may not be acting in his "official capacity" and may remain subject to liability under §1983. On the other hand, a state official acting in his "official capacity" is not a person under the statute even though the acts may be performed "*under color of state law*."

The meaning of the Court's language in *Will* can be gleaned from a comparison of the conduct alleged in that case with that alleged in the only other decision by this Court discussing the imposition of damages liability against a state executive official, *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

*Scheuer* involved allegations that state officials, including the Governor of Ohio, had intentionally, wilfully and wantonly deployed the Ohio National Guard on the Kent State campus and in the same manner, ordered the Guard members to perform allegedly illegal actions which resulted in the death of plaintiffs' decedents. 416 U.S. at 235. These allegations concern an exercise of the State's police power and are no different than those which might be raised in any §1983 action against government officials for wrongfully directing the acts of state or local police in connection with their interaction with the public at large; the type of conduct which, as this Court recognized in *Scheuer*, is most likely to give rise to a claim under the statute. 416 U.S. at 244-45.

The action had been dismissed by the lower courts on the pleadings as barred by both the constitutional immunity of the 11th Amendment and common-law doctrine of absolute executive immunity. This Court, in reversing, held that neither immunity was applicable to the conduct as alleged, 416 U.S. at

237-49, but expressly declined to make a definitive determination as to the scope of immunity which was available in that case because of a lack of a factual record. 416 U.S. at 249-50.<sup>3</sup>

In *Will*, on the other hand, the plaintiff, an employee of the Michigan Department of State Police, sought to impose damages liability against the Department and the Director of State Police in the Michigan state courts on the ground that he had been improperly denied a promotion by the Director in violation of 42 U.S.C. §1983 on the basis of the political activities of his brother. The conduct thus related solely to the management of the state government in general and the administration of state employment policies in particular. As part of the proceedings in the state courts, a factual determination was entered by the Michigan Civil Service Commission that Will had been denied promotion because of "*partisan considerations*," a clear violation of his constitutional rights. 491 U.S. at 60-61.

The Michigan trial court refused to dismiss plaintiff's claim, ruling that defendants were "persons" under 42 U.S.C. §1983. On appeal, the Michigan Court of Appeals reversed as to the Department, holding that a State was not a "person," but remanded as to the Director for a determination of his possible immunity. This decision was affirmed by the Michigan Supreme Court insofar as it held that the State, through the Department of State Police, was not a "person" and reversed as to the Director — for the express reason that a "state official acting in his or her official capacity also is not such a person." 491 U.S. at 61. This Court affirmed.

*Will* and *Scheuer* demonstrate that it is the *function* of the executive conduct involved that is dispositive of the issue whether a state official is a "person" within the meaning of §1983. *Scheuer* involved an alleged abuse of the state police power, which conduct was under color of state law but not in the Governor's "official capacity." The acts of the Director of State Police in *Will* in refusing to promote the plaintiff for partisan reasons, on the other hand, involved the management of the

3. Moreover, in *Scheuer*, the Court was only faced with the question whether the Governor was "acting under color of state law," and did not address the issue whether the Governor was acting in his "official capacity."

State's governmental structure. Although allegedly under color of state law and in violation of Will's constitutional rights, the Director's conduct was within his official capacity.

Read together, *Will* and *Scheuer* appear to establish the following principles applicable to the determination that a state official is acting in his or her official capacity and therefore not a "person" under 42 U.S.C. §1983:<sup>4</sup>

(i) *Internal governmental operation.* The conduct must relate to an internal state governmental *function*<sup>5</sup> and not to the exercise of state authority over its citizens at large.<sup>6</sup>

(ii) *Routine and frequently utilized function.* The conduct must be of a type, such as the hiring, promotion, discipline or discharge of state employees, which is performed routinely by state officials and which places these officials at great risk of being subject to numerous insubstantial and vexatious law suits. See discussion at pp. 9-12 *infra*.

4. The same analysis is equally applicable in determining whether or not state officials are acting in their official capacities so as to be protected from a suit in a federal court under the Eleventh Amendment. *Will*, 491 U.S. at 66-67.

5. This Court has consistently noted that the liability of government officials for alleged constitutional violations for a particular type of conduct must be determined through an analysis of the function being performed by that conduct, and not by the nature of the official's position. *Scheuer v. Rhodes*, 416 U.S. at 243; *Harlow v. Fitzgerald*, 457 U.S. 800, 810-13 (1982); *Forrester v. White*, 484 U.S. 219, 224 (1988).

6. Respondents have not cited, and research on behalf of Hafer has not revealed, any decision by this Court in the 120 years since the enactment of the Civil Rights Act of 1871, 17 Stat. 13, holding that a state executive officer could be subject to damages liability arising out of acts relating to internal government operations. See compilation of §1983 cases cited at notes 19, 20 and 21 of Justice Frankfurter's dissenting opinion in *Monroe v. Pape*, 365 U.S. 167, 213-15 (1961). *Forrester v. White*, 484 U.S. 219 (1988), decided one year prior to *Will*, does not so hold. That decision merely involves a determination that the absolute immunity enjoyed by state judges from liability under 42 U.S.C. §1983 does not apply to their administrative acts in connection with the employment of state parole officers, employees of the judicial, as distinguished from the executive, branch of state government.



(iii) *Adequate alternative remedy.* The consequences of the conduct can be rectified by an adequate alternative remedy such as prospective declaratory or injunctive relief.<sup>7</sup>

(iv) *In accordance with state law or policy.* The conduct must be pursuant to state law or in accordance with policy established by a state official having the final decision-making authority in connection with the alleged acts.<sup>8</sup>

(v) *Authorized official.* The actor must be a state executive branch official authorized to act with respect to the function at issue.

(vi) *Factual record.* To the extent that there is a question as to the nature of the conduct, there should be a factual record and a full and fair opportunity for the plaintiff to demonstrate that the acts were not performed within the official's "official capacity."<sup>9</sup>

7. In *Scheuer*, the plaintiffs' decedents had died as a result of the alleged actions of the governor and the award of damages was the only remedy available.

8. Under *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690-95 (1978), municipal governments, although "persons" under 42 U.S.C. §1983, are not liable for damages thereunder on the basis of *respondeat superior* for acts committed by their employees or officials, "under color of state law," unless the alleged conduct was pursuant to governmental policy. That policy, this Court has held, can be established by a *single* decision by a government official having final decision-making authority with respect to the alleged conduct. *Pembaur v. Cincinnati*, 475 U.S. 469 (1986). Prior to *Will*, several panels of the Court of Appeals for the Second Circuit expressly held that state officials acting pursuant to government policy were therefore *acting* in their "official capacities" and were not subject to liability under 42 U.S.C. §1983. *Rodriguez v. James*, 823 F.2d 8 (2d Cir. 1987); *Jones v. Smith*, 784 F.2d 149 (2d Cir. 1986). *But see* *Farid v. Smith*, 850 F.2d 917 (2d Cir. 1988).

9. That factual record should be created, to the extent practicable, in accordance with summary judgment procedures to relieve state officials from the burden and expense of litigating claims against them for acts committed in their official capacities. The factors recited above as governing the determination whether a state official is acting within his "official capacity" are objective and easy to apply and can thus be evaluated without resort to a full-scale trial on the merits. Cf. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985).

These principles necessarily derive from the holding of this Court in *Will* that States are not "persons" under 42 U.S.C. §1983 — States can only function through acts of their elected and appointed officials — and our system of federalism which is based on the existence of separate and independent state governmental entities. These factors, moreover, are clearly applicable to the alleged conduct of Hafer herein:

1-2. Hafer's conduct in discharging respondents involved the internal state governmental *function* concerning employment within the Pennsylvania Auditor General's Department; the state agency entrusted with the responsibility of assuring the proper collection and expenditure of state funds.<sup>10</sup>

3. Respondents' claims that their federal constitutional rights were violated by reason of their discharge from state employment can be remedied, as it already has been in the case of seven of the Melo respondents,<sup>11</sup> by reinstatement to their former employment. Damages are thus not essential to the redress of these claims.

4-5. Respondents' discharge was in accordance with policies established by Hafer following her inauguration as Auditor General to fire all those employees who benefitted from the job-buying scheme within the Department (Melo respondents) and to overhaul the Department by replacing certain managerial level employees by promotion within the Department (Gurley respondents). As both the District Court and Court of Appeals expressly recognized,<sup>12</sup> Hafer, as Auditor General, had final decision-making authority under Pennsylvania law in connection with the establishment and effectuation of the Department's employment policies.

6. Although there can be little doubt, as a matter of law, that Hafer, in discharging respondents, was acting in her official

10. See Brief for Petitioner, pp. 14-15 n.20

11. See copies of state arbitration awards which have been lodged with the Clerk of the Court in support of respondents' Brief herein. These awards also provide for payment to the respondents of retroactive back pay and interest thereon. Moreover, six of the Melo respondents joined in a Complaint (J.A. 37) purporting to sue Hafer in her "official capacity" and requesting reinstatement to their public employment.

12. See Brief for Petitioner, pp. 14-15.



capacity under the first five factors set forth above, she nevertheless did present to the District Court in support of her Motion for Summary Judgment (J.A. 56) a voluminous factual record, in the form of documentary and testimonial exhibits (J.A. 57-172) evidencing the official nature of her conduct, as well as the lack of merit of respondents' claims that their constitutional rights had been violated.<sup>13</sup> Respondents filed counter exhibits in opposition to Hafer's motion with respect to the question of Hafer's "capacity" (J.A. 174-237) and *expressly acknowledged that there was a sufficient record before the District Court to decide that issue.*<sup>14</sup>

Based on this record, the District Court concluded that Hafer was acting in her "official capacity" in discharging the respondents and expressly entered *summary judgment* in her favor. In the absence of any evidence to the contrary, that decision must be upheld under the principles established by *Will*. It cannot be explained away, as the Court of Appeals and respondents have attempted to do, by mischaracterizing<sup>15</sup> the effect of the District Court's ruling as merely dismissing respondents' actions on the pleadings. This was not how the matter was presented to the District Court and certainly not how it was decided. Respondents cannot now change the procedural history below to justify the insufficiency of their own factual presentation.

13. See Note 18 *infra*.

14. Respondents' Brief in Opposition to [Hafer's] Motion for Summary Judgment, pp. 1-3, a copy of which has been lodged with the Clerk of this Court in support of respondents' Brief herein. Respondents explicitly limited their claim of lack of opportunity for discovery to the issues raised by Hafer directed at the merits of respondents' claims and proceeded to address at length the question of Hafer's "capacity" (*Id.* at pp. 2-3).

15. The lengthy discourse by the Court of Appeals in this respect, *Melo v. Hafer*, 912 F.2d 628, 633-34 (3d Cir. 1990), completely ignores respondents' own concession that the issue of Hafer's "official capacity" under the Eleventh Amendment and 42 U.S.C. §1983 was properly before the District Court on summary judgment (see Note 14 *supra*) and repudiates the Court of Appeals' own decisions strictly enforcing the requirements of Fed.R.Civ.P. 56(f) prescribing the procedures to be followed in seeking additional time for discovery in response to a motion for summary judgment (Brief for Petitioner, pp. 7-8 n. 14).

In summary, *Will* should be interpreted as establishing a rule that state officials *acting* in their official capacities, as determined in accordance with the above standards, are not "persons" under 42 U.S.C. §1983. Applying these standards to the instant matter, the only conclusion possible is that Hafer, in discharging respondents, was acting in her official capacity and that the decision of the District Court to that effect in granting summary judgment in favor of Hafer must be affirmed.

## II. The Holding in *Will* Provides a Necessary Protection for State Officials From Vexatious Claims Arising Out of Acts Performed in Their Official Capacities.

The Court has recognized that the threat of innumerable "personal capacity" damage actions against state officials for their official conduct serves as a real deterrent to the proper exercise of their discretion in administering state governments. *Scheuer v. Rhodes*, 416 U.S. at 240-42; *Forrester v. White*, 484 U.S. 219, 223 (1988). These decisions conclude that the imposition of personal damages liability on state officials, and the extent of any relief therefrom, must be based upon an examination of the governmental function involved. See Note 5 *supra*. The holding in *Will*, in conformity with that authority, protects state officials from vexatious litigation with respect to a function which does subject them to numerous law suits.

It is axiomatic that a State, as a body politic, can operate only through its employees, and it is public knowledge that in our present society the number of employees necessary to operate a state government has increased enormously.<sup>16</sup> Thus, one of the primary functions performed by elected and appointed state executive officials is the hiring, promotion, discipline and discharging of state personnel and establishment of policies and practices relating thereto, so as to insure the most efficient management of state government for the benefit of the public. The employees at all times remain the employees of the

16. Between 1970 and 1987, the total number of state employees in the United States increased nearly 50% from 2,755,000 to 4,115,000. U.S. Bureau of the Census, *Statistical Abstract of the United States*: 1990 (110th ed.), p. 299, Table No. 487.

State, not the officials responsible for their employment, and all acts taken by state officials with respect to that employment are taken on behalf of the State.

As the necessity for exercising discretion in connection with the employment of state personnel has increased commensurate with the enlarged number of state employees, so has the potential for being sued with respect thereto. Every employee discharged, or treated in a manner believed to be unwarranted, even if for good cause, has a grievance against the officials responsible for the discharge or treatment, and many now give vent to that grievance by initiating "personal capacity" damage actions against those officials.<sup>17</sup> Thus, in performing their employment management functions, state officials face a situation similar to judges, whose immunity from liability under 42 U.S.C. §1983 has been justified by this Court in *Mitchell v. Forsyth*, 472 U.S. at 521-22, as follows:

The judicial process is an arena of open conflict, and in virtually every case there is, if not always a winner, at least one loser. It is inevitable that many of those who lose will pin the blame on judges, prosecutors, or witnesses and will bring suit against them in an effort to relitigate the underlying conflict....

In *Harlow* and *Forrester*, this Court has expressed its belief that the objective qualified immunity rule established in *Harlow v. Fitzgerald* will provide adequate protection to public officials from being required to expend time and money in the defense of vexatious damage claims through the use of summary motion

17. *Will; Melo v. Hafer; Rice v. Ohio Dept. of Transp.*, 887 F.2d 716 (6th Cir. 1989), vacated and remanded, 110 S.Ct. 3232 (1990); and *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989) are representative of the civil rights actions being instituted against state executive officials arising out of their employment management function. *Rice* was remanded to the Court of Appeals for reconsideration of its determination that the failure to promote a state employee for political reasons was constitutionally permissible in light of this Court's decision in *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990). In remanding, the Court did not consider the Court of Appeals' alternative holding that the individual defendants, although *sued* "in their official and personal capacities" were *acting* in their "official capacities" and were thus not "persons" under 42 U.S.C. §1983.

procedures. These procedures do not always work in employment civil rights cases. Pleadings can be framed to create colorable factual issues that are difficult to resolve on summary judgment, or as was done in these proceedings delaying tactics can be employed<sup>18</sup> to discourage summary disposition even though the law is clear, as it is in Pennsylvania, that except as expressly authorized by law, public employment is at will and employees may be terminated without reason.<sup>19</sup>

It is thus clear that there is a special need to alleviate the great burdens being placed upon *state* officials in defending, in their *personal* capacities, the proliferation of §1983 cases being instituted against them arising out of their *official conduct* in the management of the State's employment practices. The balancing of the policy considerations, at least with respect to the performance of this *necessary internal government function*, compels a greater protection for state executive officials than afforded by the qualified immunity rule. The solution, as reached through

18. In support of her Motion for Summary Judgment, Hafer presented considerable factual material (J.A. 57-172) and legal argument relating to the merits of respondents' claims and thus her entitlement to qualified immunity. Respondents chose to frustrate the summary judgment procedures and to delay the disposition of their actions by refusing to present contradictory evidence or argument concerning any issue other than that pertaining to Hafer's capacity. Although claiming lack of opportunity for discovery, respondents neither attempted to initiate discovery nor requested additional time to do so by the requisite filing of an affidavit under Fed.R.Civ.P. 56(f). Brief for Petitioner, pp. 7-8 n. 14. Having failed either to oppose Hafer's factual presentation or to submit a Rule 56(f) affidavit, respondents are bound by the uncontradicted factual statements set forth in Hafer's affidavits and documents. These uncontroverted facts show that (i) respondents did not have any property right to their public employment under Pennsylvania law, or in the case of the Melo respondents, had been discharged after a pre-termination investigation and hearing, and has been afforded a full post-termination arbitration proceeding; (ii) Hafer did not publicize the identity of any of the discharged job-buyers, including the Melo respondents, in violation of their liberty rights; and (iii) Hafer had no knowledge of respondents' political affiliations prior to the institution of respondents' actions in the District Court. These facts support entry of summary judgment in favor of Hafer on the merits and on the ground of qualified immunity.

19. *Scott v. Philadelphia Parking Authority*, 402 Pa. 151, 166 A.2d 278 (1960); *Cooley v. Pennsylvania Housing Finance Agency*, 830 F.2d 469 (3d Cir. 1987).



*Will*, is to recognize that state officials, in conducting their employment management discretion, are acting in their "official capacities," and are therefore not "persons" under 42 U.S.C. §1983.

This result does not substantially limit the scope of the statute. It will leave state executive officials subject to liability for their acts which affect the citizens of the State in general (rather than as state employees), and local governmental officials subject to liability for any of their acts under color of state law.<sup>20</sup> State employees will further retain the right to prospective relief against state officials in their official capacities to remedy any violation of their constitutional rights.

The fundamental issue in this case arises from the tension between (1) this Court's decisions in *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980), and *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729 (1990), holding that the First Amendment forbids government officials to discharge or threaten to discharge public employees for not being supporters of the political party in power and forbids promotion, transfer, recall and hiring decisions in state government on the basis of party affiliation and support, and (2) respondents' contention that, in cases brought against state executive officials arising out of discharge, hiring, promotion, transfer and recall, 42 U.S.C. §1983 may be utilized to impose on state executive officials direct, *personal liability* for money damages (and potentially for attorney's fees under the Civil Rights Attorneys Fee Award Act of 1976, 42 U.S.C. §1988) for decisions relating to these fundamental operations of state government.

In this case, respondents advocate a position that would require full-scale discovery and trial of claims of pretextual, politically-motivated discharge of employees of the Pennsylvania Auditor General's Department who were implicated by a federal investigation in an illegal political job-buying scheme. Hanging

20. Although local officials also exercise some governmental discretion in the hiring and firing of employees, since *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), §1983 actions relating thereto are generally directed against the governmental unit alone or as co-defendant with the responsible officials, and the expenses of defense are for the most part borne by the local government.

in the balance is the risk of personal liability of the Pennsylvania Auditor General for carrying out basic duties of her office. From a broader perspective, respondents' position would introduce the risk of personal liability for money damages for state executive officials for countless daily decisions relating to employee firing, hiring, promotion, transfer or recall involving the approximately 4,000,000 employees of state governments. The resulting avalanche of §1983 litigation and the chilling effect of state executive officer personal liability for money damages on the proper exercise of a basic function of state government simply cannot have been within the intent of the Congress that enacted §1983.

Unless and until this Court reconsiders and overrules *Elrod*, *Branti*, and *Rutan*,<sup>21</sup> the only protection against the potentially catastrophic and inhibiting consequences of unlimited personal liability of state executives in this sphere of activity is this Court's holding in *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989), that state officials acting in their official capacities are not "persons" within the meaning of 42 U.S.C. §1983.

21. Although petitioner has not presented in the petition for writ of certiorari in this case the issue whether this Court should reconsider and overrule the decisions in those cases, and acknowledges that this Court ordinarily does not decide questions not raised in the lower court or questions not presented in the petition for writ of certiorari, petitioner would respectfully invite the Court to reconsider those decisions and to direct briefing of the issue in this case. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 (1981) (Court afforded plenary review of the "novel" and "important" question of punitive damages in §1983 litigation against municipalities); *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (Court is not precluded from deciding issues not presented below); *Stern, Gressman & Shapiro*, *Supreme Court Practice* (6th ed.) at 363-369.



**CONCLUSION**

The Order of the United States District Court for the Eastern District of Pennsylvania, dated September 28, 1989, granting Hafer's Motion for Summary Judgment correctly applies the standards established in *Scheuer* and *Will* and should be reinstated. The judgment of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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FOR ARGUMENT

(13)  
No. 90-681

Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

BARBARA HAFFER,

*Petitioner*

v.

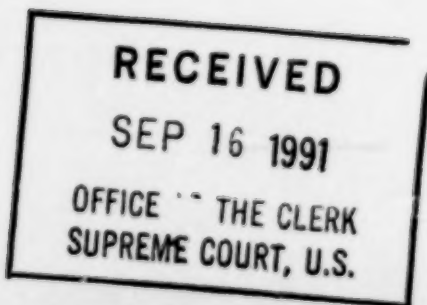
JAMES C. MELO, JR. AND CARL GURLEY, ET AL.,

*Respondents*

On Writ of Certiorari to the United States Court  
of Appeals for the Third Circuit

**SUPPLEMENTAL BRIEF  
FOR THE PETITIONER**

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## IN THE Supreme Court of the United States

OCTOBER TERM, 1990

BARBARA HAFER,

*Petitioner*

v.

JAMES C. MELO, JR. AND CARL GURLEY, ET AL.,

*Respondents*

On Writ of Certiorari to the United States Court  
of Appeals for the Third Circuit

### SUPPLEMENTAL BRIEF FOR THE PETITIONER

Petitioner Barbara Hafer, Auditor General of the Commonwealth of Pennsylvania, hereby files a Supplemental Brief to bring to the Court's attention the following matters:

#### 1. SUBSEQUENT AUTHORITY

On July 23, 1991, the Court of Appeals for the Sixth Circuit issued an opinion in the case of *Ritchie v. Wickstrom, et al.*, No. 90-2280. The opinion has not yet been reported and a copy is attached hereto as Appendix A.

*Ritchie* was a civil rights action under 42 U.S.C. §1983 instituted by a state prisoner against a correctional officer and a prison administrator to recover damages for personal injuries allegedly caused by the improper closing of a cell door and

subsequent inadequate medical attention. The District Court granted summary judgment in favor of the individual defendants on the grounds that plaintiff's claim was barred by the Eleventh Amendment. On appeal, the Court of Appeals disagreed with the District Court's determination as to the Eleventh Amendment, but affirmed on the ground that the record showed no conduct by defendants in violation of the plaintiff's civil rights.

Although deciding that *Ritchie* was an "individual capacity" action against the state officers, the Court of Appeals reaffirmed its prior decision in *Cowan v. University of Louisville School of Medicine*, 900 F.2d 936 (6th Cir. 1990) that an action against state university officers for unlawful dismissal from state university was an "official capacity" not an "individual capacity" action, because the defendants were *acting* in their "official capacities."<sup>1</sup> In distinguishing *Cowan* from *Ritchie*, Judge Guy, who wrote both opinions, emphasized that in discharging *Cowan*, the individual defendants in that action, "were merely carrying out state policy, and as such, the suit was no different than if it was brought solely against the state." Appendix A, p. B-6. The *Ritchie* opinion is thus consistent with petitioner's position herein, as stated at pp. 5-8 of Petitioner's Reply Brief, that conformity with state policy is one of the factors to be considered in determining whether a state officer is *acting* within his or her "official capacity" and therefore not a "person" under 42 U.S.C. §1983.

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1. In *Cowan*, the Court of Appeals relied on its prior decision in *Rice v. Ohio Department of Transp.*, 887 F.2d 716 (6th Cir. 1989), vacated and remanded, 110 S.Ct. 3232 (1990). [Petitioner's Petition for Certiorari and initial Brief herein did not cite the subsequent history of *Rice*. That omission was corrected in petitioner's Reply Brief.] *Rice* was remanded by this Court to the Court of Appeals for reconsideration of its determination that the failure to promote a state employee for political reasons was constitutionally permissible in light of this Court's decision in *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990). The Court of Appeals for the Sixth Circuit, by its continued reliance upon *Cowan*, apparently agrees with petitioner's position herein (Reply Brief for the Petitioner, p. 10 n. 17) that this Court's disposition of *Rice* did not affect the alternative holding by the Court of Appeals in that case that the individual defendants, although sued "in their official and personal capacities," were acting in their official capacities and were thus not "persons" under 42 U.S.C. §1983.

## 2. CORRECTIONS TO JOINT APPENDIX

In preparing for oral argument, errors have been found in the Joint Appendix in connection with the reproduction of one of the documents filed in the District Court by respondents in opposition to petitioner's Motion for Summary Judgment (Transcript of Debate between Donald Bailey and Barbara Hafer).<sup>2</sup> Corrected Joint Appendix pages JA-183 and JA 187-189 are included herein in Appendix B.

Respectfully submitted,

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2. In addition, the references at p. JA-6 of the Joint Appendix to the pages of the Petition for Certiorari where the Order of the United States Court of Appeals denying Petition for Rehearing and Order of the United States District Court for the Eastern District of Pennsylvania granting Motion for Summary Judgment were reproduced are incorrect. The correct references are A-33 and A-35, respectively.

## **APPENDIX**



APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 24

No. 90-2280

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

HARRY RITCHIE,  
*Plaintiff-Appellant,*

v.

MICHAEL WICKSTROM,  
THEODORE W. KOEHLER,  
*Defendants-Appellees.*

ON APPEAL from the  
United States District  
Court for the Western  
District of Michigan

Decided and Filed July 23, 1991

Before: GUY and NORRIS, Circuit Judges, and FRIEDMAN, District Judge.\*

RALPH B. GUY, JR., Circuit Judge. Plaintiff, Harry Ritchie, appeals from a decision by a magistrate judge<sup>1</sup> to grant the defendants' motion for summary judgment. The magistrate judge concluded the defendants' claim that this suit was barred by the eleventh amendment was well-founded.<sup>2</sup>

\*The Honorable Bernard A. Friedman, United States District Court for the Eastern District of Michigan, sitting by designation.

1. On April 2, 1990, the parties filed a consent order of reference allowing the magistrate judge to make a final disposition in this case.

2. The magistrate judge, in a report to the district judge, had earlier recommended that a motion for dismissal or summary judgment be denied. The district judge adopted the report and recommendation of the magistrate judge. The eleventh amendment claim was not implicated until a second motion for dismissal or summary judgment was filed by the defendants.

Upon a review of the record, we reject the magistrate judge's eleventh amendment analysis, but affirm the dismissal on other grounds.

### I.

The facts can be simply stated and essentially are not in dispute. The plaintiff was an inmate at the Marquette state prison, an institution within the correctional system of the State of Michigan. On October 5, 1985, plaintiff's leg was injured when it was caught in the cell door that was being automatically closed by defendant Wickstrom, a correctional officer at the Marquette facility. Although Ritchie was taken to first aid, there appeared to be no injury of consequence. There was no swelling and the skin was not broken. He was seen two days later and no problems were noted. At the end of the month, Ritchie came into the clinic and requested return to work status, indicating that there was nothing wrong with his leg. His request was granted. The following month, however, Ritchie began complaining of left leg pain. Plaintiff was seen by prison medical personnel on October 31 and November 15, 1985. Examination did not reveal any deformity or swelling, or a significant limp. There was full range of motion in the knee, but on full extension the knee appeared to snap into place. A meniscal tear was ruled out and notes reflect that an x-ray was to be obtained.

There are no further progress notes until March 15, 1986, when plaintiff again began complaining of left leg discomfort. On March 18, the following notation appears:

Patient is still complaining of pain in his left knee which he has had for some time. He was referred to the orthopedic surgeon several months ago, but apparently has not yet been seen. There has been a backlog of orthopedic patients due to the fact that the orthopedic surgeon broke his ankle, and is only now "catching up." Patient advised that we will make certain that he is definitely seen on the next orthopedic consult visit. We will also renew his Ecotrin to be used for prn pain.

On April 10, Dr. Lyons examined plaintiff. He offered only a recommendation of physical therapy. Plaintiff was subsequently transferred to Jackson state prison where he received an orthopedic consultation. On October 22, 1986, a left knee arthroscopy was performed.

A March 17, 1987, report from a Dr. Mishra states:

This gentleman was injured about 1985 in Marquette when he claims that his leg was slammed against a door. At that time he was scoped and was found to have a possible tear of the anterior cruciate ligament and lateral meniscus with nothing done at that time. He never got better. He still had locking and giving out and it has now come to a point that he cannot even walk without it locking.

Examination shows that the patient has a very tender lateral and medial joint, anterior is 2+ and Lochman is 2+ positive. Internal rotation causes severe pain.

Neurovascular status and x-rays are normal.

He was diagnosed as having a torn lateral meniscus, and Dr. Mishra suggested another arthroscopy with possible removal of the lateral meniscus.

In March 1988, plaintiff filed this lawsuit alleging negligent injury and a 42 U.S.C. §1983 claim for deliberate infliction of injury and deliberate indifference to medical needs.<sup>3</sup>

### II.

A proper analysis of this case calls into play the interpretation, or perhaps misinterpretation, of several earlier decisions by this court involving eleventh amendment immunity and the differences between a suit against defendants in their "individual capacity" and their "official capacity." Also implicated are the Supreme Court decisions which our court interpreted and applied.

---

3. The federal suit was started only after an earlier suit filed in the Michigan Court of Claims was dismissed on the basis of the court having no jurisdiction over the individual defendants.

Our analysis begins with *Brandon v. Holt*, 469 U.S. 464 (1985), which arguably started the confusion in "official capacity" lawsuits. In *Brandon*, a section 1983 action was brought against a police officer for assault. The Director of the Police Department was also sued in his "official capacity." The city was not named as a defendant because, and this is important, the complaint was filed before the decision in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), overruled *Monroe v. Pape*, 365 U.S. 167 (1961). Under *Monroe*, cities could not be defendants in section 1983 actions. Thus, in an effort to get a "deep pocket," the plaintiff in *Brandon* sued the Director in his official capacity. A public official is only a "deep pocket," however, if the governmental unit will pay the judgment. This may or may not occur. In order to provide the plaintiff in *Brandon* with the "deep pocket" he would have had post-*Monell*, the Supreme Court simply declared that a suit against a public official in his "official capacity" is a suit against the governmental unit.

What goes around comes around, however, and the "deep pocket" feeling of euphoria felt by plaintiffs post-*Brandon* was dampened somewhat when the Supreme Court issued its opinion in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989).<sup>4</sup>

In *Will*, the Supreme Court determined that states are not "persons" within the meaning of section 1983 and that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against . . . the State itself." *Id.* at 71 (citations omitted).

Also relevant is the decision in *Kentucky v. Graham*, 473 U.S. 159 (1985), which was decided before *Will* but after *Brandon*. In *Graham*, the Court stated:

Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an

4. *Will*, of course, is applicable only when a state and its officials are sued.

entity of which an officer is an agent." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55 (1978). . . .

On the merits, to establish *personal* liability in a §1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. More is required in an official-capacity action, however, for a governmental entity is liable under §1983 only when the entity itself is a "moving force" behind the deprivation; thus, in an official-capacity suit the entity's "policy or custom" must have played a part in the violation of federal law.

473 U.S. at 165-66 (citations omitted).

Consideration of two other cases is necessary to complete the legal backdrop. In *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986), the Supreme Court made it clear that pleading labels do not control when the issue is the "capacity" of the defendant:

The first paragraph of the complaint alleged that the action was brought against the defendants "in their individual and official capacities." There is, however, nothing else in the complaint, or in the record on which the District Court's judgment was based, to support the suggestion that relief was sought against any School Board member in his or her *individual* capacity.

*Id.* at 543. The Court went on to disregard the "individual capacity" designation.

In *Cowan v. University of Louisville School of Medicine*, 900 F.2d 936 (6th Cir. 1990), we dismissed claims against individual defendants, holding that the claim was an "official capacity" claim and, thus, was really an attempt to collect money damages against the University of Louisville, which, as a state agency, had eleventh amendment immunity. The decision in *Cowan*, of which I was the author, is being misinterpreted by the defendants. The defendants read the decision much too broadly. The defendants' reading of *Cowan* is exactly what Judge Wellford feared in his prescient concurrence.



In order for a person to be sued in a section 1983 action, he must be acting under color of law. Historically, many plaintiffs pleaded the element of "color of law" by stating a defendant was acting in an "official capacity," because it follows *ipso facto* that one acting in an official capacity for a governmental unit is acting under color of law. It is only recently that this method of pleading the "color of law" element has become a problem. *Cowan* does not stand for the proposition that every time a state official is charged with misconduct while acting within the general ambit of his job title eleventh amendment immunity comes into play. All that was intended in *Cowan* was to indicate that in that case the two individual defendants were merely carrying out state policy and, as such, the suit was no different than if it was brought solely against the state.

When the foregoing is used as the analytical tool to evaluate plaintiff's claim in the case at bar, it becomes instantly clear that the suit against corrections officer Wickstrom is an "individual capacity" suit not subject to eleventh amendment protections.<sup>5</sup> Similarly, we believe the suit against Koehler is an "individual capacity" suit, notwithstanding that no "hands on" misconduct is claimed. Koehler is sued as the policy maker for the institution. See, e.g., *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). A judgment against Koehler would not be a judgment against the State, and the State would not be compelled to reimburse Koehler or pay the judgment. If the State should voluntarily pay the judgment or commit itself to pay as a result of a negotiated collective bargaining agreement, this would *not* change the analysis. We thus reverse the decision to dismiss on eleventh amendment grounds. We nonetheless, however, conclude that this case should be dismissed on other grounds. We are free to affirm on an alternate basis. *Herm v. Stafford*, 663 F.2d 669 (6th Cir. 1981).

On the state of the record before us, we conclude that the only wrongful acts that possibly could be attributed to defendant

Wickstrom are acts of negligence. Negligence will not ground a section 1983 action. *Daniels v. Williams*, 474 U.S. 327 (1986).

As to defendant Koehler, the plaintiff has failed to refute properly the affidavits of record, which indicate that Koehler was not responsible directly or indirectly for the medical treatment, or lack thereof, received by Ritchie. We view this as a case in which a plaintiff, having struck out in the state court of claims, now vainly tries to turn his negligence case into a federal constitutional claim. Nothing that occurred here rises to the level of a constitutional violation. We therefore AFFIRM the judgment of the magistrate judge.

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5. We do not find this holding to be inconsistent with *Wells v. Brown*, 891 F.2d 591 (6th Cir. 1989), when *Wells* is read against the clear mandate of the relevant Supreme Court decisions.

[JA-183]

## APPENDIX B

Kate: "Your time for answering that is up. Mr. Stoffer, you have a question then for Mr. Bailey."

Stoffer: "I guess, following that train of thought, with the history in your department under the prior administration of job selling and macing perhaps, why did you not simply make a clean break, especially in light of the fact that such things as macing may not be spoken, but may be implied by innuendoes to employees. Why not just make a clean break and say 'I will accept no contributions from employees of the Auditor General's Department'?"

Bailey: "Harry, if someone wants to make a contribution, and it's a voluntary contribution, there is no reason why those contributions should not be accepted. Mrs. Hafer has done so, she has admitted publicly that she has. Virtually every person in office that I know of has done so, or accepted voluntary contributions."

Those charges, incidentally, that occurred during the prior administration have absolutely nothing to do, and the U.S. Attorney has made it very, very clear, that the, uh, in no way do any of those difficulties touch in any way, and he has publicly stated this, uh, on me. And I am very proud of the fact that we have just turned in an absolutely remarkable job of administration and effectiveness during my tenure. And the difficulty with this campaign, and the very sad part about it, is that a relative and meaningful discussion of substantive issues for the benefit of the public to evaluate a campaign has been . . . . And I think that substantive . . . important issues in the campaign, . . . when they touch on things of . . . public, should be focused on. . . . things that you have mentioned . . . occurred five and six and seven and eight years ago and have absolutely nothing to do, and have never had anything to do with the fine job that we have turned in for the public as Auditor General of the Commonwealth of Pennsylvania."

Kate: "O.K. Mr. Bailey. Thank you. Mrs. Hafer, your response."

Hafer: "Don, that simply is not true and you know it. Let's stick to the facts. The fact is, your Chief Deputy, Harold Imber, is in jail for what . . . racketeering and job selling. Two other people under the Benedict administration are in jail for what . . .

[JA-187-189]

need someone that knows how to practice professionally, high standards, integrity. And with a history as a County Commissioner in the second largest county in the Commonwealth, I have a budget of \$440,000,000,000 and 8,000 employees. I am not only qualified, the Press and Post Gazette and the Tribune Review have said that I am the best qualified."

Kate: "Mr. Bailey."

Bailey: "Well, I think that maybe the best evidence is the kind of job performance that you have turned in as a Commissioner. Thelma Shroeder was an appointee of yours out there at the prison, the jail. You are chairman of the Prison Board. Two people are dead today, while you were running around the state campaigning for Lt. Governor. Law suits were filed in May. What responsibility did you perform. Apparently none. Now let's go back to Jeannette. That was not an audit. That was information that we gave to investigators. And it's no secret that I opposed Mr. Driscoll for incompetence and for not doing his job when he ran for District Attorney. But even he admitted publicly that close to \$3,000 in hot dogs, or missing food or money was gone. Money representing 20 to 30 percent of the profits of a school activity fund. I think that's wrong. Your references to Carbon County are just plainly and simply totally false, baseless and without foundation and fact."

Kate: "Harry Stoffer you have your question for Mr. Bailey."

Stoffer: "Mr. Bailey, last week you disclosed the results of your investigation into the 20 names that had been given to you by the U.S. Attorney's office, you said that you couldn't do anything about two of them because they had been ordered reinstated by an arbitrator. I understand that in another case you have appealed an arbitrator's decision to the state Supreme Court over an employee who put in for \$14 too much in expense reimbursement. Uh, don't you have a case of misplaced priorities here, and does this second case not smack of some vindictiveness against an employee who came up with some audit results you didn't like?"

Bailey: "No it does not, Harry. First of all, I don't have the authority to appeal an arbitrators' decision that's years old. I



[JA-187-189]

can't do it. So the premise of your question is simply incorrect. Secondly, the reason that we, in fact, are appealing the other case is because it is something that occurred during my administration and we are bound and determined to see that the law is enforced. There is no inconsistency at all. I am powerless in the first two cases. And incidentally, on those 20 names, isn't it time to be honest with the public. The press core, myself, even my opponent honestly knows that the U.S. Attorney has said that I cannot in, there is no way that I can reveal those names. He can't reveal them. I can't reveal those names. He knew that when they were referred. And all of that information that we requested and that we helped with and that we investigated on our own initiative, we weren't asked, we weren't challenged, we did it because we believed it was the right and proper thing to do, is five and six and seven and eight years old. And the majority of those people, these notes and names that were gleamed from reports, none of those people had been investigated, there was no attempt to charge them in wrongdoing, they were names that needed to be checked out. And you know, we need to respect people's rights and we need to conduct ourselves in accordance with responsibility. We were prompt, we were thorough, we were complete and very decent and open and nonpolitical about it and that's what we are going to continue to do."

Kate: "O.K. Mrs. Hafer."

Hafer: "Don, that is simply not true. The truth really isn't in you. Those 20 names were given to you by Jim West at your request. I have the letter, the transmittal letter. I talked to Mr. West last week. He said not only did he give you the information, he gave you specific instructions to proceed with the investigation and punish those people as you saw fit. You were the only one who has the names that can release them. You are absolutely right, the FBI won't release those names. You are the ones that should release those names. You are the ones that wanted the list. You were given the list in January and again instructed in July to clean house. Nine months is not timely. It is a continuation of those, uh, the corruption of the previous administration. You not only, those people bought their jobs, you make them keep paying."

[JA-187-189]

Kate: "O.K. Mrs. Hafer and Mr. Bailey, I am going to exercise my moderators' prerogative now to ask a few questions in the time remaining. You will each have a minute and 15 seconds to respond to these questions and I will direct my first question to Mrs. Hafer."

Following up on what you just said, if you were elected Auditor General, what would you do to, uh, remove that some people see as a remaining cloud over the Department, considering the fact that it's known that there are these 20 people?"

Hafer: Well, one of those people are now in jail, Harold Imber, uh, on that list. But let me just tell you what I would do, and I would talk, and I have already talked with the U.S. Attorney about this, when I am Auditor General I will investigate and fire those people. There will be no job selling, no corruption and no macing in Hafer's administration. It is unbelievable that in Pennsylvania that we have a history of macing and job selling. That went out years ago, years ago. Yet we have a fellow that is supposed to be of the highest standard, and his predecessor, his colleague, they had joint fundraisers together in '84 continuing, we have Don Bailey continuing the corrupt practices of the last administration, He and Al Benedict are cut out of the same bolt of cloth. There is corruption in that office. I am going to investigate and I am going to fire those people."

Kate: "Mr. Bailey."

Bailey: "Yeah, first of all, what Barbara has said is totally and completely false. Now we have set up an entire new standard of ethics in the office, we wrote that into the office when I came into the office. The information that she is talking about are charges made against people, some of them unjustified, incidentally, that were, goes back five and six and seven years ago. Barbara has just made my day. The fact that she has discussed these issues with the U.S. Attorney itself raises a number of serious questions. She is also incorrect in that the U.S. Attorney does have the freedom, if he would like, to certainly, to release those names. In fact, he has commented to the press that he can do so. One must wonder why, if those two were talking and/or working together, why this list was ever floated to the press to begin with. When we did check these people out, we found that half of these people had absolutely no



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OCTOBER TERM, 1990

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*Respondents.*

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On Writ of Certiorari to the United States  
Court of Appeals for the Third Circuit

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**MOTION FOR LEAVE TO FILE BRIEF AND  
BRIEF OF THE  
NATIONAL ASSOCIATION OF COUNTIES,  
COUNCIL OF STATE GOVERNMENTS,  
NATIONAL GOVERNORS' ASSOCIATION,  
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,  
NATIONAL LEAGUE OF CITIES,  
U.S. CONFERENCE OF MAYORS, NATIONAL  
INSTITUTE OF MUNICIPAL LAW OFFICERS, AND  
NATIONAL CONFERENCE OF STATE LEGISLATURES  
AS AMICI CURIAE IN SUPPORT OF PETITIONER**

---

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No. 90-681

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NATIONAL CONFERENCE OF STATE LEGISLATURES  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

---

Pursuant to Rule 37.4 of the Rules of this Court, *amici* respectfully move for leave to file the accompanying brief *amicus curiae* in support of petitioner. Petitioner has consented to the filing of the brief. Respondents have refused consent.

*Amici* are organizations whose members include state, county and municipal governments and officials through-

out the United States. They have a vital interest in all aspects of the law, substantive and procedural, pertaining to civil rights actions brought against state and local government officials under 42 U.S.C. 1983.

While the substantive question of section 1983 liability presented in the petition is of great importance, *amici* respectfully submit that an important procedural question is necessarily comprehended therein: whether a government official may be sued under 42 U.S.C. 1983 for damages when the complaint fails to identify the capacity in which the official is sued. The court below addressed this question at length, *see* Pet. App. 15-17, and, we submit, reached an erroneous conclusion which—as that court acknowledges—is in direct conflict with the holdings of two other courts of appeals. *See id.* at 16 n.7.

Proper resolution of this question will serve the interest of judicial economy and lessen the intrusion of civil litigation into the processes of government by fostering the intended operation of the sovereign immunity doctrine. It will also ensure that pleadings in section 1983 cases serve their intended purpose—to “give the defendant fair notice of what the plaintiff’s claim is.” *See Conley v. Gibson*, 355 U.S. 41, 47 (1957).

Because of the importance of this issue to all state and local governments and officials, *amici* seek leave to file this brief to assist the Court in the resolution of this case.

Respectfully submitted,

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## QUESTION PRESENTED

*Amici* will address the following question:

Whether a government official may be sued under 42 U.S.C. 1983 for damages when the complaint fails to identify the capacity, official or personal, in which the official is sued.

April 11, 1991

(i)



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**INTEREST OF THE *AMICI CURIAE***

The interest of the *amici* is set forth in the motion that precedes this brief.



## RULES INVOLVED

Federal Rule of Civil Procedure 8(a).

### Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Federal Rule of Civil Procedure 9(a).

### Rule 9. Pleading Special Matters

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

## STATEMENT

On January 16, 1989, Barbara Hafer was sworn in as Auditor General of Pennsylvania. Pet. App. 37. On February 1, 1989, eighteen employees in the Office of the Auditor General, including eight of the respondents, were terminated. *Id.* On February 21 the eight other respondents, also employees in the Office of the Auditor General,

were terminated. *Id.* During April and May the 16 respondents commenced 11 different section 1983 actions arising out of these terminations. *Id.* at 6-7.

Hafer is named as a defendant in each of these 11 actions. Pet. App. 37 n.2. Ten of the actions were each filed on behalf of a single plaintiff. In none of these ten actions do the complaints identify the capacity, official or personal, in which Hafer is sued. See Pet. App. 16; see also, e.g., J.A. 7-19, 26-29, 33-36. The eleventh and last complaint to be filed was filed jointly by the six remaining plaintiffs. Pet. App. 15. Only in this final complaint was reference made to the fact that these six employees seek certain relief from Hafer in her official capacity and other relief from her in her personal capacity. See *id.*; J.A. 41-55.

On June 14, 1989, Hafer answered the complaints. Pet. App. 7. On July 18, 1989, the district court consolidated the eleven separate cases into two actions. *Id.* at 7, 37 n.2. In one of the consolidated actions, the "Melo" action, the eight plaintiffs are the employees who were terminated on February 1, 1989. See Pet. App. 36-37. The eight plaintiffs in the other consolidated action, the "Gurley" action, are the employees who were terminated on February 21, 1989. See *id.*

Each of the eight plaintiffs in the *Melo* action seeks to recover \$2 million in compensatory damages, \$1.5 million in punitive damages, and attorneys' fees. Pet. App. 6-7. The eight plaintiffs in the *Gurley* action each seek to recover \$500,000 in compensatory damages and \$500,000 in punitive damages. *Id.* at 7. Six of the *Gurley* plaintiffs also seek injunctive relief consisting of reinstatement without back pay. *Id.*

On August 9, 1989, Hafer filed a consolidated dispositive motion in the *Melo* and *Gurley* actions. Pet. App. 8. On September 28, 1989, the district court granted Hafer's dispositive motion. *Id.* at 9, 36-40.<sup>1</sup> The district court

<sup>1</sup> At the time Hafer's motion was granted discovery had only recently commenced. See Pet. App. 11-13.

held that the terminated employees' actions against Hafer were barred because "Hafer's power to cause the terminations derived solely from her authority as a state official", *id.* at 40, and a section 1983 action does "not lie against a State or its officials acting in their official capacity," *id.* at 37 (citing *Will v. Michigan Department of State Police*, 109 S. Ct. 2304, 2312 (1989)).

Treating the district court's orders as granting a motion to dismiss, the court of appeals vacated the judgment of the district court in Hafer's favor. *See* Pet. App. 13, 32. Before reaching the issue of whether Hafer could be sued for terminating the plaintiffs, the court extensively analyzed the 11 complaints. *See id.* at 15-17. The court acknowledged that "[a] defendant being sued in his or her personal capacity should be given adequate notice that his or her personal assets are at stake." *Id.* at 16 n.7. The court also conceded that "[i]t is obviously preferable for the plaintiff to be specific in the first instance to avoid any ambiguity." *Id.* The court of appeals nonetheless held that it is irrelevant that ten of the eleven complaints do not identify the capacity in which Hafer is sued. *See id.* at 16.

#### INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented, while a pleading question, is of vital importance to the courts, public officials, and public employers. In *Kentucky v. Graham*, 473 U.S. 159, 165-68 (1985), this Court, responding to confusion among attorneys and the lower courts, meticulously delineated the distinctions between personal and official capacity civil rights actions against state officials. The court below applied a pleading rule which obliterates those distinctions.

Even though the federal civil rules require a plaintiff to plead capacity when necessary to establish jurisdiction, *see* Fed. R. Civ. P. 8(a)(1), 9(a), the court of appeals

held that a plaintiff is not required to identify in the complaint the capacity in which a government official is sued for damages under section 1983. *See* Pet. App. 15-17. *See also* *Melton v. City of Oklahoma City*, 879 F.2d 706, 726-27 & n.29 (10th Cir.), *reh'g granted in part on other grounds*, 888 F.2d 724 (10th Cir. 1989) (*en banc*); *Conner v. Reinhard*, 847 F.2d 384, 394 n.8 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988); *Lundgren v. McDaniel*, 814 F.2d 600, 603-604 (11th Cir. 1987). In so holding the court below expressly disagreed with other courts of appeals which "require the complaint to specifically identify the capacity in which a defendant is being sued" in a section 1983 action. Pet. App. 16 n.7 (citing *Wells v. Brown*, 891 F.2d 591, 593 (6th Cir. 1989); *Nix v. Norman*, 879 F.2d 429, 431 (8th Cir. 1989)).

*Amici* respectfully submit that the court below was in error. The federal civil rules eliminated the unnecessary burdens and pitfalls of common law pleading. *See Conley v. Gibson*, 355 U.S. 41, 47 (1957). The rules nonetheless require the complaint to set forth the grounds of the court's jurisdiction, *see* Fed. R. Civ. P. 8(a)(1), and to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," *see Conley v. Gibson*, 355 U.S. at 47. By its holding, the court of appeals eviscerated those requirements in section 1983 cases. The rule applied by the court below and other courts of appeals undermines the operation of the immunity doctrine of the Eleventh Amendment, unreasonably burdens public officials and public employers in their defense of civil rights actions, and unfairly advantages section 1983 plaintiffs. The holding of the court below should be reversed and the case remanded so that the respondents may, if they deem it appropriate, move to amend their complaints. *See* Fed. R. Civ. P. 15(a).<sup>2</sup>

<sup>2</sup> *Amici* express no view on the question whether a state official may be liable in her personal capacity under section 1983 for terminating employees in her department.



## ARGUMENT

### I. THE FEDERAL RULES OF CIVIL PROCEDURE REQUIRE A PLAINTIFF TO PLEAD THE BASIS OF THE COURT'S JURISDICTION AFFIRMATIVELY AND DISTINCTLY.

Fed. R. Civ. P. 8(a)(1) requires that the complaint allege the basis of the court's jurisdiction "affirmatively and distinctly"; jurisdiction "cannot 'be established . . . by mere inference.'" 5 C. Wright & A. Miller, *Federal Practice & Procedure* 93-94 & nn. 13-14 (2d ed. 1990) (quoting *Thomas v. Board of Trustees*, 195 U.S. 207, 218 (1904)). See also *McNutt v. GMAC*, 298 U.S. 178, 189 (1936); James, *The Objective and Function of the Complaint*, 14 Vand. L. Rev. 899, 901 (1961). The requirement that jurisdiction be alleged affirmatively in the complaint is reiterated in Rule 9(a). This rule dictates that where "required to show the jurisdiction of the court," the capacity in which a government official is sued must be pleaded with specificity. See Fed. R. Civ. P. 9(a); *Wells v. Brown*, 891 F.2d at 593. See generally *Moore v. Mitchell*, 281 U.S. 18 (1930).

### II. THE CAPACITY IN WHICH A GOVERNMENT OFFICIAL IS SUED IN A SECTION 1983 ACTION IS JURISDICTIONAL AND MUST BE PLEADED WITH SPECIFICITY.

The Eleventh Amendment deprives the federal courts of jurisdiction to entertain civil rights damages actions against state officials in their official capacity. See *Will v. Michigan Department of State Police*, 109 S.Ct. 2304, 2311-12 (1989); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98-99 & n.8 (1984) (citing *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 467 (1945)). Because the capacity in which a state official is sued is jurisdictional, capacity must be affirmatively and distinctly pleaded in the complaint and is not to be deduced by mere inference. See Fed. R. Civ.

P. 8(a)(1), 9(a); *Thomas v. Board of Trustees*, 195 U.S. at 218. Moreover, specific allegations of capacity are essential to give the defendant fair notice of the claim and the grounds upon which it rests because the fundamental nature of the case and the source of recovery depend upon the capacity in which the government official is sued. See *Kentucky v. Graham*, 473 U.S. at 165-68.

The court of appeals has nonetheless relieved section 1983 plaintiffs of the obligation to plead capacity at all. If left undisturbed, its holding will confirm the existence in some circuits of a rule that section 1983 plaintiffs do not have to meet the minimal pleading requirements of Fed. R. Civ. P. 8(a)(1) and 9(a). See Pet. App. 16 (citing *Conner v. Reinhard*, 847 F.2d at 394 n.8, *Melton v. City of Oklahoma City*, 879 F.2d at 727 n.32; *Lundgren v. McDaniel*, 814 F.2d at 604).

The court below and other courts of appeals which have reached this result base their holdings on the following *dicta* in *Kentucky v. Graham*:

In many cases, the complaint will not clearly specify whether officials are sued personally, in their official capacity, or both. 'The course of proceedings' in such cases typically will indicate the nature of the liability sought to be imposed. *Brandon v. Holt*, 469 U.S. 464, 469 (1985).

473 U.S. at 167 n.14. See Pet. App. 15; *Conner*, 847 F.2d at 394 n.8; *Melton*, 879 F.2d at 726; *Lundgren*, 814 F.2d at 604. *Amici* respectfully submit that these lower courts have improperly construed the *Graham dicta*.<sup>3</sup> *Amici* further submit that the case from which the

<sup>3</sup> Some courts have interpreted the *Graham dicta* as creating a rule which relieves section 1983 plaintiffs of any obligation to plead capacity and shifts the plaintiffs' burden to the courts. Under this view, when the plaintiff elects not to plead capacity the court "must" analyze the "course of proceedings" to resolve the capacity issue. See *Melton*, 879 F.2d at 726. See also *Lundgren*, 814 F.2d at 604.



*Graham dicta* were drawn, *Brandon v. Holt*, had an unusual procedural history.

The plaintiffs in *Brandon* filed their complaint before this Court's decision in *Monell v. Department of Social Services* changed the law by establishing that municipal officials are subject to suit in their official capacity. See 436 U.S. 658, 690-91 (1978). Although the *Brandon* complaint did not state that the Memphis Director of Police was sued in his official capacity, the extensive record developed after the *Monell* decision "plainly identifi[ed]" the plaintiffs' claim for damages as one asserted against the Director in his official capacity. See 469 U.S. at 471; see also *id.* at 469-71 & nn. 12-18. "Given this state of the record," the *Brandon* Court held that "at this late stage of the proceedings, petitioners are entitled to amend their pleadings to conform to the proof and to the District Court's findings of fact." *Id.* at 471 & n.19 (citing Fed. R. Civ. P. 15(b)); see also *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 221 n.6 (1985). In this case there has been no change in the law, nor does the incipient record contain a "plain identification" of the capacity in which Hafer has been sued. The *Brandon* analysis is accordingly inapplicable.

The rule applied by the court below is particularly destructive in the section 1983 context because it undermines the sovereign immunity doctrine, seriously disadvantages government officials and attorneys in the preparation of a defense, and unfairly advantages section 1983 plaintiffs.<sup>4</sup>

<sup>4</sup> Some of the courts which have declined to impose such a rule—including the court below—concede that specific pleading of capacity is "preferable". See Pet. App. 16 n.7 ("It is obviously preferable for the plaintiff to be specific in the first instance to avoid any ambiguity."); *Duckworth v. Franzen*, 780 F.2d 645, 650 (7th Cir. 1985) ("urg[ing] counsel for civil rights plaintiffs when they are suing a state officer in his individual capacity to say so plainly"), *cert. denied*, 479 U.S. 816 (1986).

#### A. The Holding of the Court Below Undermines the Operation of The Sovereign Immunity Doctrine.

The social costs of civil litigation against state and local government officials, "not only to the defendant officials, but to society as a whole," are well known. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 & n.22 (1982) (citing Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 S.Ct. Rev. 281). The sovereign immunity doctrine places distinct limits on this class of litigation. Where the doctrine is applicable—as, for example, in section 1983 damages suits against state officials for actions taken in their official capacity, see *Will*, 109 S.Ct. at 2311-12—it is intended to terminate litigation at the earliest, least intrusive, and least expensive stage. "[T]he essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). Consequently, "an absolute immunity . . . is effectively lost" if a case is erroneously permitted to go beyond the pleading stage. See *id.* at 526.

In *Harlow v. Fitzgerald* the Court reiterated that the firm application of the federal civil rules at the pleading stage is essential to the intended operation of an immunity.<sup>5</sup>

'Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful

<sup>5</sup> Because of the burgeoning volume of section 1983 actions the courts of appeals have uniformly "tightened the application" of the factual pleading requirements of Rule 8 in this class of cases. See, e.g., *Arnold v. Board of Education of Escambia County*, 880 F.2d 305, 309 (11th Cir. 1989); *Frazier v. SEPTA*, 785 F.2d 65, 67-68 (3d Cir. 1986) (Adams, C.J.); *Elliot v. Perez*, 751 F.2d 1472, 1479 & n.20 (5th Cir. 1985); *Hobson v. Wilson*, 737 F.2d 1, 29-30 & n.87 (D.C. Cir. 1984) (collecting cases), *cert. denied*, 470 U.S. 1084 (1985). Cf. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149-150 (1984) (declining to relax Rule 8 pleading requirements in Title VII actions).

pleading. Unless the complaint states a compensable claim for relief, it should not survive a motion to dismiss. . . . [P]laintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.'

457 U.S. at 808 (quoting *Butz v. Economou*, 438 U.S. 478, 507-508 (1978)). By relieving section 1983 plaintiffs of the obligation to plead jurisdiction affirmatively and distinctly, the holding of the court below plainly subverts the immunity doctrine.

The untoward consequences of this holding, both for the judiciary and for government officials, is illustrated by *Meadows v. Indiana*, 854 F.2d 1068 (7th Cir. 1988). Former members of the Indiana National Guard brought a section 1983 damages action against the State and numerous state officials arising out of the termination of their Guard memberships. The district court found jurisdiction and rendered a judgment on the merits in favor of the defendants. *See id.* at 1068. Almost a year later, during oral argument in the court of appeals, plaintiffs' counsel readily conceded that the plaintiffs had no basis for a personal capacity suit against the state officials. *See id.* at 1069. The court of appeals thereupon vacated the judgment in favor of the defendants and remanded the case for dismissal on Eleventh Amendment grounds. *See id.* at 1070. Had the plaintiffs in *Meadows* specifically pleaded the capacity in which they had sued the government officials, this disposition would have been made on a motion to dismiss filed early on during the district court proceedings rather than years later in the court of appeals.

#### **B. The Holding of the Court Below Impedes Defendant Officials in the Preparation of Their Defense.**

The federal civil rules require the complaint to contain a statement of the claim that is sufficient to enable the defendant to prepare a defense. *See discussion supra* at

5-6. The holding of the court below, however, impedes the preparation of a defense by government officials since it interferes with the invariably urgent task of designating defense counsel.

In numerous States government attorneys are statutorily obligated to defend officials sued in their official capacity.<sup>6</sup> Concomitantly, the government may decline to defend an official sued in his or her personal capacity, or may be precluded from doing so.<sup>7</sup> Critical decisions about

<sup>6</sup> *See, e.g.*, Cal. Gov't Code sec. 26529 (Deering 1991) ("The county counsel shall defend . . . all civil actions and proceedings in which the county or any of its officers is concerned or is a party in his or her official capacity."); Del. Code Ann., tit. 29, sec. 2504(3) (1983) (attorney general "to represent as counsel in all proceedings or actions which may be brought . . . against them in their official capacity in any court . . . all officers . . . of state government"); Idaho Code Ann. sec. 67-1401.1 (1989) (attorney general to "defend all causes to which the state or any officer thereof, in his official capacity, is a party"), *construed in Parsons v. Beebe*, 116 Idaho 551, 777 P.2d 1224, 1226 (1989); Ill. Ann. Stat. ch. 34, para. 3-9005(4) (Smith-Hurd 1990) (State's attorney "[t]o defend all actions and proceedings brought against . . . any county or State officer, in his official capacity, within his county"), *quoted in Kolar v. County of Sangamon*, 756 F.2d 564, 565 (7th Cir. 1985); Iowa Code Ann. sec. 331.756.6 (West 1983) ("The county attorney shall . . . defend all actions and proceedings in which a county officer, in the officer's official capacity, or the county is interested or a party."); Miss. Code Ann. sec. 7-5-39 (1972) (attorney general to "act as counsel for any of the state officers in suits brought . . . against them in their official capacity"); R.I. Gen. Laws Ann. sec. 42-9-6 (1988) (attorney general to defend state officers "in all suits and proceedings which may be brought against them in their official capacity"); Utah Code Ann. sec. 67-5-1 (1990) (attorney general to "defend all causes to which" any state officer "in an official capacity is a party"), *construed in Hearn v. Utah Liquor Control Comm'n*, 548 P.2d 242, 245 (Utah 1976); Wash. Rev. Code Ann. sec. 43.10.030 (1983) (attorney general "shall . . . defend actions and proceedings against any state officer or employee acting in his official capacity").

<sup>7</sup> *See, e.g.*, *Kentucky v. Graham*, 473 U.S. at 162 (State declines to defend official); *Hearn v. Utah Liquor Control Commission*, 548 P.2d at 245 (State precluded from defending official). *Cf. Nev.*



the representation of defendant officials must thus be made immediately after the summons and complaint are served. This decision-making process is needlessly obstructed when plaintiffs are relieved of the obligation to identify in the complaint the capacity in which the official is sued.

**C. Requiring the Complaint to Identify the Capacity in Which Government Officials are Sued Does Not Unreasonably Burden Plaintiffs in Section 1983 Actions.**

Vital purposes of state governance and judicial administration are served when capacity is required to be pleaded distinctly and affirmatively. Yet, as this Court has recognized, requiring such specific pleading does not burden a civil rights plaintiff. It would, the Court said with express reference to section 1983 litigation,

verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief available. Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action.

*Bounds v. Smith*, 430 U.S. 817, 825 (1977).<sup>8</sup> As Justice Holmes observed, "the party who brings a suit is master to decide what law he will rely upon." *The Fair v. Kohler Die and Specialty Co.*, 228 U.S. 22, 25 (1913). In view of that rule and the provisions for amendment

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Rev. Stat. sec. 41.0339 (1979) (attorney general to investigate civil action against state official within 15 days after service of summons and complaint to determine whether State will undertake defense); S.C. Code Ann. sec. 1-7-60 (Law. Co-op. 1986) (attorney general shall investigate prior to undertaking defense of state official).

<sup>8</sup> "[S]uch preliminary research . . . is no less vital" for a *pro se* section 1983 plaintiff. *Bounds*, 430 U.S. at 825-26.

of pleadings, *see* Fed. R. Civ. P. 15, there is no fathomable justification for excusing civil rights plaintiffs from pleading with specificity the capacity in which they are suing government officials. In short, "[i]t is certainly reasonable to [require] that all [section 1983] plaintiffs . . . alert party defendants that they may be individually responsible in damages" by identifying in the complaint the capacity, official or personal, in which they are sued. *See Wells v. Brown*, 891 F.2d at 594.

**CONCLUSION**

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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April 11, 1991



MOTION FILED  
MAY 2 1991

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No. 90-681

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IN THE  
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1990

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BARBARA HAFFER,

*Petitioner*

v.

JAMES C. MELO, JR. AND CARL GURLEY, ET AL.,

*Respondents*

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ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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MOTION FOR LEAVE TO FILE  
BRIEF FOR THE AMICUS CURIAE  
NANCY HABERSTROH, Ph. D.;  
CERTIFICATE OF NOTICE; and  
NOTICE OF APPEARANCE

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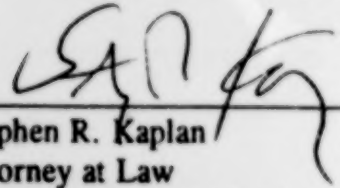
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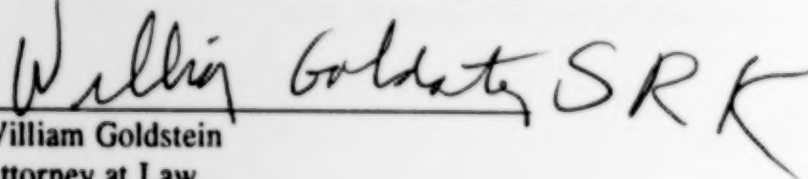
Comes now Nancy Haberstroh, Ph.D., of Longmeadow, in the Commonwealth of Massachusetts, Amicus Curiae, and moves the Court for leave to file the within Brief in support of the position taken by the Respondents. And she says that the judgment of the Court will be binding applicable precedent in an action which she has pending in the Superior Court of said Commonwealth, all as described in her Statement of Interest. And further she says that William Goldstein of Bensalem, Pennsylvania, counsel for the Respondents, has assented to the filing of said Brief, and has authorized Stephen R. Kaplan of Northampton, Massachusetts, a member of the Bar of this Court, to affix his statement of assent hereto, but that Jerome R. Richter of

Philadelphia, Pennsylvania, attorney for the Petitioner, has refused to assent. And she says that the within Brief may be helpful to the Court, and that the same contains arguments of law that may not be adequately presented by the Respondent, whose interests are in conflict with her own.

NANCY HABERSTROH, Ph.D.

By   
Stephen R. Kaplan  
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50 Center Street, P.O. Box 144  
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I assent to the allowance of said Motion and the filing of the within Brief, and authorize Stephen R. Kaplan of Northampton, a member of the Bar of this Court, to affix my signature hereto.

  
William Goldstein  
Attorney at Law  
Four Greenwood Square  
Bensalem, PA 19020  
Tel. (215) 638-9330

CERTIFICATE OF SERVICE

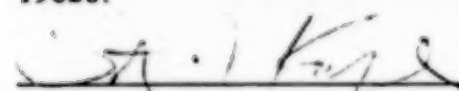
Hampshire, ss:

May 3, 1991

I, Stephen R. Kaplan of Northampton, Massachusetts, a member of the Bar of this Court, hereby certify that, on or before this date, while acting on behalf of the Amicus Curiae Nancy Haberstroh Ph. D., of Longmeadow, Massachusetts, I served the within Motion and Brief on all parties required to be served by

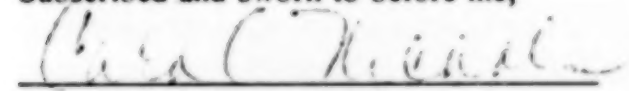


depositing in a United States Post Office three copies, first class postage prepaid, addressed to Jerome R. Richter, Esq., Attorney for the Petitioner, at his offices at Four Penn Center Plaza, Philadelphia, Pennsylvania 19103, and by depositing in a United States Post Office, three copies, first class postage prepaid, addressed to William Goldstein, Attorney for the Respondents, at his offices at Four Greenwood Square, Bensalem, Pennsylvania 19020.

  
 Stephen R. Kaplan  
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Hampshire, ss: May 3, 1991

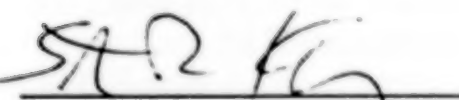
Subscribed and sworn to before me,

  
 Cara Nichols Notary Public  
 My Commission Expires November 4, 1994

#### NOTICE OF APPEARANCE

Hampshire, ss: May 3, 1991

I, Stephen R. Kaplan of Northampton, Massachusetts, a member of the Bar of this Court, hereby appear for the Amicus Curiae Nancy Haberstroh, Ph. D., of Longmeadow, Massachusetts.

  
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### Statement of Interest of Amicus Curiae

Your amicus curiae submits this Brief in support of the position taken by the respondents at bar. Chief of the Department of Psychology at Monson Developmental Center, a facility of the Commonwealth of Massachusetts Department of Mental Retardation, she presently has pending in the Commonwealth Superior Court an action under 42 U.S.C. § 1983 for compensatory and punitive damages against five of her erstwhile superior officers, whom she sues in their individual capacities. Supported by the findings of an official investigator and by the Commonwealth's prearbitration settlement of her grievance under the applicable collective bargaining agreement, she bases her action on defendants' unlawful agreement, which was carried into execution, to punish her for First Amendment activity by subjecting her to a fraudulent evaluation, trumped-up charges, and demotion to an entry-level position. Acting under the State Tort Claims Act, Massachusetts General Laws Chapter 258, Section 9A, the Commonwealth has undertaken to indemnify all of the defendants except for the former facility superintendent and chief accused, but is precluded from doing so in the case of wilful, wanton, or malicious conduct. *Id.* Under applicable State precedent, liability for punitive damages erects a bar to indemnity. *Pinshaw v. Metropolitan District Commission*, 402 Mass. 687, 524 N.E. 2d 1351 (1988). If this Court determines the Questions Presented adversely to respondents, the resulting precedent will impair your amicus's federal cause of action.



## Summary of Argument

Under governing English and American precedents from *Entick v. Carrington*, 19 How St Tr, 1029, 95 Eng Rep 807 (1765), through and including *Quern v. Jordan*, 440 U.S. 332, 59 L Ed 2d 332 (1979), sovereign immunity is not implicated in an award of damages against an officer in his or her personal estate. Accordingly, this Court has developed doctrines of qualified immunity to protect officers performing nonjudicial functions in a manner not inconsistent with clearly established law. These embrace functions which could only be performed on behalf of government, inclusive of personnel actions. A state officer performing such functions is a person acting under color of law, and so is subject to actions at law under 42 U.S.C. § 1983.

## Argument

Sovereign immunity is not implicated in an award of damages against an officer in his personal estate by reason of his official acts. See, e.g., *Entick v. Carrington*, 19 How St Tr, 1029, 95 Eng Rep 807 (1765);<sup>1</sup> *Little v. Barreme*, 2 Cranch 170,

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<sup>1</sup> Churchill describes this case:

"There were other conflicts. On April 23, 1763, a newspaper called *The North Briton* attacked Ministers as 'tools of despotism and corruption'...The writer hinted that the peace treaty with France was not only dishonourably but also dishonestly negotiated, and that the King was a party to it. George was incensed. A week later his Secretary of State issued a warrant commanding that the authors, printers, and publishers of '*The North Briton*, No. 45,' none of whom was named, should be found and arrested. Searches were made, houses were entered, papers were seized, and nearly fifty suspects were put in prison. Among them was John Wilkes, a rake and a Member of Parliament. He was sent to the Tower....But his cause became a national issue when he returned to fight for his Parliamentary seat. The radical-minded Londoners welcomed this rebuff to the Government, and in March 1768 he was elected for Middlesex. The next February he was expelled from the House of Commons and there was a by-election. Wilkes stood again, and obtained 1,143 votes against his Government opponent, who polled 296. There were bonfires in London....

2 L Ed 243 (1804) (seizure of vessel by naval officer acting under

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"Wilkes's cause now found the most powerful champion in England. Pitt himself, now Earl of Chatham, in blistering tones attacked the legality of general warrants and the corruption of politics....[T]he outcry against general warrants led directly to important pronouncements by the judges on the liberty of the individual, the powers of the Government and freedom of speech. Wilkes and the other victims sued the officials who had executed the warrants. The judges ruled that the warrants were illegal. The officials pleaded that they were immune because they were acting under Government orders. This large and sinister defense was rejected by the Chief Justice in words which remain a classic statement on the rule of law. 'With respect to the argument of State necessity,' declared Lord Camden, 'or a distinction which has been aimed at between State offenses and others, the Common Law does not understand that kind of reasoning, nor do our books take notice of any such distinction.' If a Minister of the Crown ordered something to be done which was unlawful, then both he and his servants must answer for it in the ordinary courts of law in the same way as a private person....Wilkes obtained £4,000 damages from the Secretary of State himself. Another suitor, who had been detained only for a few hours and fed with steak and beer, recovered £300. 'The small injury done to the plaintiff,' said the Chief Justice, 'or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point touching the liberty of the subject appeared to them at the trial.'

"Here indeed was a potent weapon against overbearing ministers and zealous officials. Habeas Corpus might, and did, protect the subject from unlawful arrest, or at any rate ensure his speedy release from gaol; but a civil action for false imprisonment hit the authorities where it hurt most, in their private pockets, and the unfettered right of juries to assess the damages at whatever figure they thought fit was a formidable deterrent to such as might be tempted to offend public opinion by relying on 'reasons of State.' The lesson bit deep. Even in the dark times to come, when the struggle with Napoleon forced the Government to take all sorts of repressive measures against real or imagined traitors, the powers of the executive to infringe the liberty of the subject were narrowly circumscribed and vigilantly watched by Parliament. Not until the world wars of the twentieth century was the mere word of a Minister of the Crown enough to legalise the imprisonment of an Englishman."

W. S. Churchill, *The Age of Revolution*, Bantam, N.Y. (1957), 138-140.

invalid Presidential instructions); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 29 L Ed 2d 619 (1971) (implying action for damages by reason of Fourth Amendment violation); *Larson v. Domestic and Foreign Commerce Corporation*, 337 U.S. 682, 686-688, 93 L Ed 1628, 1634-1635 (1949);<sup>2</sup> *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101, 79 L Ed 2d 67, 79, n. 11 (1984);<sup>3</sup> and *Quern*

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<sup>2</sup> "The question presented to the courts below was whether such an injunction [against the sale of government-owned property to a competing bidder] was barred by the sovereign's immunity from suit. Before answering that question it is perhaps advisable to state clearly what is and what is not involved. There is not involved any question of the immunization of Government officers against responsibility for their wrongful actions. If those actions are such as to create a personal liability, whether sounding in tort or contraction, the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him. As was said in *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 580, 87 L Ed 471, 476 (1943), the principle that an agent is liable for his own torts 'is an ancient one and applies even to certain acts of public officers or public instrumentalities.' But the existence of a right to sue the officer is not the issue in this case. The issue here is whether this particular suit is not also, in effect, a suit against the sovereign. If it is, it must fail, whether or not the officer might otherwise be suable....[T]he crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign. In a suit against the officer to recover damages for the agent's personal actions that question is easily answered. The judgment sought will not require action by the sovereign or disturb the sovereign's property. There is, therefore, no jurisdictional difficulty. The question becomes difficult and the area of controversy is entered when the suit is not one for damages but for specific relief: i.e., the recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant officer's actions. In each such case the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect be obtained against the sovereign."

<sup>3</sup> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'

*v. Jordan*, 440 U.S. 332, 345, 59 L Ed 2d 332, 369-370, n. 17 (1979).<sup>4</sup>

Impliedly reaffirming the availability of Section 1983 judgments against state officers individually for actions taken officially ("a victory against the individual"), which is what respondents are seeking in the matter at bar, this Court has drawn a bright line between "personal-capacity" suits directed against the personal estate of officials like the petitioner Hafer, and "official-capacity" suits directed against the public treasury and therefore subject to the Eleventh Amendment proscription articulated in *Will v. Michigan Department of State Police*, 491 U.S. , 109 S. Ct. 2304, 105 L Ed 2d 45 (1989) and relied on by the instant petitioner. For the distinction, see *Kentucky v. Graham*, 473 U.S. 159, 165-166, 87 L Ed 2d 114, 121, (1985) (unreasonable search and seizure):

"Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' As long as the government entity

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*Dugan v. Rank*, 372 U.S. 609, 620, 10 L Ed 2d 15 (1963)."

<sup>4</sup> "Mr. Chief Justice Marshall's opinion in *Osborn [v. Bank of the United States]*, 9 Wheat 738, 6 L Ed 204 (1824)] makes it clear that in determining whether a court can grant relief the key inquiry is whether the state officer was in fact the real party in interest or whether he was only a nominal party. 9 Wheat, at 858, 6 L ed 204....Mr. Chief Justice Marshall emphasized this precise point just four years later in *Governor of Georgia v. Madrazo*, 1 Pet 110, 7 L Ed 73 (1828). In *Madrazo*, a vessel carrying slaves was seized and the slaves were delivered into the possession of the Governor of Georgia. The slaves were sold and the proceeds were placed in the state treasury. *Madrazo* filed a libel in the Federal District Court, naming the Governor of Georgia, among others, as a defendant. Restitution was ordered by the lower courts, but this Court reversed because although the demand for relief nominally was against the Governor of the State, it was clear that the action in fact sought relief directly from the state treasury, relief that was forbidden by the Eleventh Amendment."



receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.<sup>5</sup>

It is precisely due to the unavailability of sovereign immunity that this Court has found it necessary to develop prudential doctrines of absolute or qualified personal immunity for federal officials sued individually for damages at common law or under *Bivens*, and State officials sued under Section 1983. In doing so, the Court has generally preserved the common-law tradition of individual personal liability for unlawful executive acts done under color of law. For a refusal to accord absolute immunity to most functions of officials sued in their individual capacities and for a catalogue of the various immunities, see *Forrester v. White*, 484 U.S. 219, 223-225, 98 L Ed 2d 555, 563-564 (1988).<sup>6</sup> All the work which this Court has expended in

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<sup>5</sup> This extract from *Graham* is cited with approval in *Will*. 105 L Ed 2d at 58. It appears that the *Will* plaintiff's action for damages was directed exclusively at the State treasury. The Michigan Supreme Court took that position in the judgment which this Court affirmed, and accordingly directed its discussion to the doctrine of *Edelman v. Jordan*, 415 U.S. 651, 39 L Ed 2d 662 (1974). *Will v. Department of Civil Service*, 428 Mich. 540, , 410 N.W. 2d 749 at 767-770 (1987). The Michigan court noted that "We deal then only with the question whether a state official being sued in an official capacity for retroactive relief is a person for purposes of § 1983." 410 N.W. 2d at 768. The determinant, then, was the capacity in which the official was being sued, not that in which he or his official predecessor had acted.

<sup>6</sup> "Aware of the salutary effects that the threat of liability can have, however, as well as the undeniable tension between official immunities and the ideal of the rule of law, this Court has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court....Officials who seek exemption from personal liability have the burden of showing that such

reconciling the ideal of the rule of law with the need for fearless public administration, by developing a qualified immunity doctrine,<sup>7</sup> is wasted effort, and *Forrester* and its progenitors are wrongly decided, if petitioner is correct in her contention that an executive officer of a public employer "acting within her official capacity in connection with the discharge of employees [is] entitled

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an exemption is justified by overriding considerations of public policy, and the Court has recognized a category of 'qualified' immunity that avoids unnecessarily extending the scope of the traditional concept of absolute immunity.

"This Court has generally been quite sparing in its recognition of claims to absolute official immunity. One species of such legal protection is beyond challenge: the legislative immunity created by the Speech or Debate Clause, U.S. Const, Art I, § 6, cl 1. Even here, however, the Court has been careful not to extend the scope of the protection further than its purposes require. Furthermore, on facts analogous to those in the case before us, the Court indicated that a United States Congressman would not be entitled to absolute immunity, in a sex discrimination suit filed by a personal aide whom he had fired, unless such immunity was afforded by the Speech or Debate Clause.

"Among executive officials, the President of the United States is absolutely immune from damages liability arising from official acts. This immunity, however, is based on the President's 'unique position in the constitutional scheme,' and it does not extend indiscriminately to the President's personal aides, or to cabinet level officers. Nor are the highest executive officials in the States protected by absolute immunity under federal law."

(Citations omitted).

<sup>7</sup> In the case of government officials performing discretionary functions, the test for liability is whether their conduct has violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L Ed 2d 396, 410 (1982). Further, in the case of a statute, there has to be a clear violation of the statutory rights that give rise to the cause of action for damages. *Davis v. Scherer*, 468 U.S. 183, 194, 82 L Ed 2d 139, 149, n. 12 (1984). The officer's conduct is appraised in the light of the historical information actually available to her. *Anderson v. Creighton*, 483 U.S. 635, 641, 97 L Ed 2d 523, 532 (1987).



to the absolute immunity of the Eleventh Amendment to the Constitution of the United States". The contrary established doctrine is that such officers are "person[s acting] under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory", and so subject to the Fourteenth Amendment and to Section 1983, albeit under the shield of qualified immunity. As this Court said in *United States v. Classic*, 313 U.S. 299, 326, 85 L Ed 1368, 1383 (1941); and in *Monroe v. Pape*, 365 U.S. 167, 184, 5 L Ed 2d 492, 503 (1961): "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

Nothing turns on the matter, observed by the District Judge, that "[plaintiffs'] grievances are directed against the impact of the Commonwealth's termination of their employment. Hafer's power to cause the terminations derived solely from her authority as a[n] official." The same could be said of personnel actions taken by a Member of Congress, *Davis v. Passman*, 442 U.S. 228, 60 L Ed 2d 846 (1979), and by a state judge, *Forrester v. White*, 484 U.S. 219, 98 L Ed 2d 555 (1988), and by the Secretary of the Air Force at the prompting of a Presidential counsellor, *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L Ed 2d 396 (1982); and of cancellation of a license by the Secretary of Agriculture, *Butz v. Economou*, 438 U.S. 478, 57 L Ed 2d 895 (1978); and of search and seizure by the Attorney General, *Mitchell v. Forsyth*, 472 U.S. 511, 86 L Ed 2d 411 (1985); and forfeiture of good time by a prison disciplinary committee, *Cleavinger v. Saxner*, 474 U.S. 193, 88 L Ed 2d 507 (1985); and deployment of the National Guard by the Governor of Ohio, *Scheuer v. Rhodes*, 416 U.S. 232, 40 L Ed 2d 90 (1974).


## Conclusion

Petitioner should be remitted to such qualified immunity as she may find in the measurement of her conduct by the standards of *Elrod v. Burns*, 427 U.S. 347, 49 L Ed 2d 547 (1976); and *Branti v. Finkel*, 445 U.S. 507, 63 L Ed 2d 574 (1980). See also *Rutan v. Republican Party of Illinois*, 497 U.S. , 111 L Ed 2d 52 (1990). The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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**United States Court of the United States**  
**DOCKET TERM, 1990**

**BARBARA HAFER, PETITIONER**

**v.**

**JAMES C. MELO, JR., ET AL., RESPONDENTS**

**On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit**

**NOTICE FOR LEAVE TO FILE BRIEF FOR THE  
AMERICAN CIVIL LIBERTIES UNION AND THE  
ACLU OF PENNSYLVANIA AS AMICI CURIAE  
AND BRIEF AS AMICI CURIAE  
IN SUPPORT OF RESPONDENTS**

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**BEST AVAILABLE COPY**

# **In the Supreme Court of the United States**

OCTOBER TERM, 1990

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No. 90-681

BARBARA HAFFER, PETITIONER

v.

JAMES C. MELO, JR., ET AL., RESPONDENTS

---

On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit

---

## **MOTION FOR LEAVE TO FILE BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF PENNSYLVANIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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Pursuant to Rule 37.4 of the Rules of this Court, the American Civil Liberties Union (ACLU) and the ACLU of Pennsylvania respectfully move for leave to file the accompanying brief as *amici curiae* in support of respondents. Counsel for respondents has consented to the filing of this brief, but counsel for petitioner has refused consent.

The ACLU is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and civil rights laws. Since its founding nearly 70 years ago, the ACLU has been particularly concerned with the ability of individuals to obtain redress for violations of their federal constitutional



rights. The ACLU has, therefore, appeared before this Court in numerous cases concerning the scope of the federal civil rights laws, both as counsel for parties and as *amicus curiae*. The ACLU of Pennsylvania is one of the ACLU's statewide affiliates.

This case brings before the Court a significant question regarding the availability of damages in actions against state officers under 42 U.S.C. § 1983. The position urged by petitioner, if adopted, would leave persons harmed by unconstitutional state action unable to obtain compensation for their injuries. The elimination of the damages remedy would also significantly reduce Section 1983's effectiveness in deterring violations of constitutional rights. *Amici* have a strong interest in preventing such an unjustified restriction on this important federal remedy.

Respectfully submitted.

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# QUESTION PRESENTED

Whether this Court's decision in *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), forecloses a damages remedy under 42 U.S.C. § 1983 for injuries caused by the official conduct of a state officer when the officer is sued in his or her personal capacity.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1990

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No. 90-681

BARBARA HAER, PETITIONER

v.

JAMES C. MELO, JR., ET AL., RESPONDENTS

---

On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit

---

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION  
AND THE ACLU OF PENNSYLVANIA AS  
AMICI CURIAE IN SUPPORT OF RESPONDENTS

---

**INTEREST OF THE AMICI CURIAE**

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and civil rights laws. The ACLU of Pennsylvania is one of the ACLU's statewide affiliates. As described in the accompanying motion for leave to file this *amicus* brief, petitioner's argument regarding the scope of 42 U.S.C. § 1983, if adopted, would reduce dramatically the scope of this important federal remedy, depriving persons injured by unconstitutional state action of any opportunity to obtain compensation for their injuries and eliminating the deterrent effect of

the damages remedy now recognized under Section 1983.

### STATEMENT

1. Petitioner is the incumbent Auditor General of the Commonwealth of Pennsylvania, a state-wide elected officer charged with overseeing the receipt and disbursement of public funds. The complaint alleges that in the course of petitioner's 1988 campaign for election to that post, petitioner stated that she had been given a list of employees of the Auditor General's office who had "bought their jobs."<sup>1</sup> Petitioner promised that, if elected, she would fire all of the employees on the list. After petitioner assumed office, she fired 18 employees whose names supposedly were on the list, including eight of the respondents. Pet. App. A5.

The latter eight respondents allege that their discharges were politically motivated (petitioner is a Republican and they are Democrats who supported petitioner's opponent in the election) and, in addition, that the discharges violated their procedural and substantive due process rights. The other eight respondents (who allege that they too are Democrats) also contend that they were fired in violation of the free speech and due process protections conferred by the Constitution. All of the respondents sought relief under 42 U.S.C. § 1983, asserting claims for compensatory and punitive damages and attorneys' fees. J.A. 7-19, 26-29, 33-36, 37-41.<sup>2</sup> Six

<sup>1</sup> Petitioner's predecessor had been informed of these allegations by the United States Attorney's office, conducted an inquiry, and concluded that no wrongdoing had occurred. Pet. App. A4.

<sup>2</sup> A number of separate complaints were filed by respondents.

of the respondents also sought an order reinstating them to their jobs in the Auditor General's office. J.A. 41.

2. The district court dismissed the actions. Pet. App. A36-A42. The court stated that "[petitioner's] removal of plaintiffs from their positions occurred in her role as Auditor General, a constitutional office under the Pennsylvania Constitution." *Id.* at A40. Observing that respondents were "employees of the Commonwealth, not of [petitioner]," the district court stated that petitioner's "power to cause the terminations derived solely from her authority as a state official. Had [petitioner] been acting in a personal capacity, she would not have been empowered to effectuate the discharges." *Ibid.* Apparently because the complaints sought damages for injuries caused by petitioner's official acts, the court dismissed respondents' Section 1983 claims. Pet. App. A38-A40.

3. The court of appeals unanimously reversed. Pet. App. A1-A33. The court acknowledged that this Court in *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), held that Section 1983 damages actions could not be brought against state officers in their official capacities. It concluded that "because personal capacity suits against state officials are actions against the individual and not the state, state officials sued for damages in their personal capacities are 'persons' under section 1983 and therefore subject to suit." Pet. App. A14-A15.

The court went on to determine "whether [respondents] sued [petitioner] in her personal capacity, official capacity, or both," by "first look[ing] to the complaints and the 'course of proceedings.'" Pet.

App. A15 (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)). The court observed that one set of respondents had expressly sued petitioner in her official capacity—seeking reinstatement—and in her personal capacity—seeking damages. The court concluded that the remaining complaints “signified a similar intent” to institute personal capacity damages actions against petitioner “because the captions in the complaints only list ‘Barbara Hafer,’ and not the Commonwealth of Pennsylvania, as a defendant, and only request damages from Hafer and not from the state.” Pet. App. A16. The court added that “[i]t appears that [petitioner] understood that [respondents] sought to sue her in her personal capacity because she raised the defense of qualified immunity throughout the course of these proceedings, a defense available only for governmental officials when they are sued in their personal, and not in their official, capacity.” *Ibid.*

The court of appeals concluded that “once [respondents] explained in the district court that they sued [petitioner] for damages in her individual capacity, they should have been given leave to amend to so assert with specificity, if there was any remaining ambiguity about that issue.” Pet. App. A16. It therefore held that respondents had asserted Section 1983 damages claims against petitioner in her personal capacity and remanded the case for further proceedings with respect to those claims.<sup>3</sup>

<sup>3</sup> Eight respondents also asserted claims under Section 1983 and state law against James J. West, the then-Acting United States Attorney, alleging that West had conspired with petitioner to violate respondents’ rights by providing petitioner with the names of the employees who allegedly had “bought their jobs.” Pet. App. A4-A5. These Section 1983

## INTRODUCTION AND SUMMARY OF ARGUMENT

I. The position advanced by petitioner in this case is truly extraordinary. Although 42 U.S.C. § 1983 expressly establishes a damages remedy for injuries caused by conduct “under color of” state law, a category this Court has held to be essentially coextensive with the “state action” subject to the Fourteenth Amendment, petitioner asserts that Section 1983 does *not* supply a damages remedy if the plaintiff’s injury stems from conduct by a state officer in her official capacity. Acceptance of petitioner’s contention would effectively read Section 1983 out of the United States Code by removing from the statute’s scope the very official governmental misconduct for which it was intended to provide a remedy. Nothing in Section 1983 or in this Court’s precedents requires that bizarre result. This Court should reaffirm that official state action is actionable under Section 1983.

Petitioner’s argument rests on the melding together of two entirely distinct inquiries that arise from the fact that persons holding government office have an “official” capacity in addition to their “personal” capacity. The first inquiry is whether the defendant was *acting* in her official capacity or in her personal capacity when she engaged in the conduct that produced the injury that is the subject of the suit. The express language of Section 1983 specifies that the defendant must have been acting in her official capacity in order to be subject to liability, stating

claims were dismissed by the courts below. Pet. App. A20-A23, A40-A42. The court of appeals declined to uphold the district court’s dismissal of the state law claims, remanding that aspect of the case for further consideration. *Id.* at A23-A32.



that the defendant's conduct must have been "under color of" state law.

The second inquiry seeks to identify the capacity in which the defendant is *sued* by the plaintiff. This Court has recognized that a state officer may be sued in her personal capacity or in her official capacity. The capacity in which the officer is named as a defendant has important consequences for the conduct of the litigation and the relief that may be available. See generally *Kentucky v. Graham*, 473 U.S. 159 (1985). Construing the term "person" in Section 1983, the Court held in *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), that a state official is not subject to suit in her official capacity in an action for damages under Section 1983.

Petitioner does not here challenge the court of appeals' determination that respondents instituted these actions against her in her personal capacity. Petitioner instead asserts that respondents had no right to bring personal capacity suits on the facts of this case. She contends that where, as here, a plaintiff is harmed by official capacity conduct, the plaintiff may not sue the state officer in her personal capacity for money damages. The plaintiff's sole option, according to petitioner, is to commence an official capacity action in which he may obtain only prospective relief.

This Court should reject petitioner's invitation to eviscerate Section 1983. It is clear beyond any doubt that the statute creates a damages remedy for injuries caused by official conduct. The plain language of the statute establishes as much and this Court's decisions confirm that Section 1983 encom-

passes official action such as the discharges challenged in this case.

Petitioner rests her argument solely on the decision in *Will*. But the Court there held only that an officer may not be *sued* in her official capacity in an action for damages. The Court did not in any way hold—or even indicate—that a personal capacity action for damages may not be grounded in an injury caused by official conduct.

II. Amici National Association of Counties, et al. (NAC), urge reversal of the court of appeals' judgment on a ground not raised by petitioner, asserting that some of the complaints in this action are deficient because they do not expressly set forth the capacity in which suit was brought against petitioner. Because that argument was not presented in the certiorari petition—and, contrary to NAC's claim, the argument is not jurisdictional—the Court should not address the question here.

In any event, the court of appeals properly examined "[t]he course of proceedings" (*Brandon v. Holt*, 469 U.S. 464, 469 (1985)) in determining that the complaints asserted claims against petitioner in her personal capacity. There is no warrant for this Court to second guess that fact-bound determination.

## ARGUMENT

### I. SECTION 1983 SUBJECTS A STATE OFFICIAL TO PERSONAL LIABILITY FOR HER OFFICIAL ACTIONS

#### A. The Plain Language Of The Statute And A Long Line Of This Court's Decisions Make Clear That Section 1983 Provides A Damages Remedy For Injuries Caused By Official State Action.

1. This Court has recognized many times that the starting point in construing Section 1983 is the language of the statute, which "must be broadly construed." *Dennis v. Higgins*, 111 S. Ct. 865, 868 (1991) (quoting *Golden State Rapid Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444, 448 (1989)). The provision imposes liability on "[e]very person who, under color of [state law] \* \* \* subjects" any person to a deprivation of rights secured by the Constitution or federal law. The plain meaning of this provision encompasses conduct by a state officer in her official capacity. Official acts of a state officer are necessarily acts "under color of" state law.

This Court's precedents confirm the common sense conclusion that Section 1983 reaches official acts of state officers. The Court long ago held that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *United States v. Classic*, 313 U.S. 299, 326 (1941) (interpreting 18 U.S.C. § 241, the criminal analog to Section 1983). Accord, *West v. Atkins*, 487 U.S. 42, 49 (1988); *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 695-701 (1978); *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

It is settled that a state officer need not violate a state law limit on her authority for her actions to constitute conduct "under color of" state law within the meaning of Section 1983. The Court recently explained that the "under color of" state law requirement means that Section 1983 liability attaches to "those wrongdoers 'who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.'" *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988) (quoting *Monroe v. Pape*, 365 U.S. at 172). "[G]enerally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *West*, 487 U.S. at 50. See also *Paratt v. Taylor*, 451 U.S. 527, 535-536 (1981).<sup>4</sup>

Indeed, the Court repeatedly has made clear that "if a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, 'that conduct [is] also action under color of state law and will support a suit under § 1983.'" *West v. Atkins*, 487 U.S. at 49 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982)). Accord, *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982); *United*

<sup>4</sup> To our knowledge, no Member of the Court has ever disagreed with the proposition set forth in the text. The Court was for a time divided over the question whether official acts that violated the state law limits on an officer's authority were nonetheless acts performed "under color of" state law, but it concluded that such conduct is actionable under Section 1983. *Monroe v. Pape*, 365 U.S. at 187. See also *Williams v. United States*, 341 U.S. 97, 99 (1951); *Screws v. United States*, 325 U.S. 91, 107-111 (1945). Ironically, petitioner's position is apparently that the latter situation is the *only* one in which damages are available under Section 1983.



*States v. Price*, 383 U.S. 787, 794 n.7 (1966). There can be no doubt that official acts of state officers constitute "state action" subject to the Fourteenth Amendment. Those acts accordingly may form the basis for a suit under Section 1983.

2. Petitioner does not directly challenge this Court's construction of Section 1983's "under color of" state law requirement. Rather, petitioner argues (Br. 13, 16-17) that when the plaintiff's injury stems from official conduct, the Section 1983 remedy is sharply limited: the plaintiff may not institute a personal capacity action to recover damages for his injuries. Thus, if a lawsuit seeks relief for harm caused by official conduct, it is necessarily an official capacity action and the plaintiff may obtain only prospective relief.

To begin with, petitioner has suggested no reason that Section 1983 alters the general rule that the capacity in which an individual is party to a suit turns solely upon how the plaintiff has chosen to frame the action. Indeed, the Court has applied that standard in determining the capacity of parties to Section 1983 actions. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 543 (1986); *Kentucky v. Graham*, 473 U.S. 159 (1985); *Brandon v. Holt*, 469 U.S. 464 (1985). Cf. *Karcher v. May*, 484 U.S. 72 (1987) (intervenor's capacity).

Certainly nothing in the language of the statute supports petitioner's contention. Section 1983 states that "[e]very person" who acts under color of state law to deprive another of federal constitutional and statutory rights "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." The statute thus confers a

broad right to seek all forms of relief against "person[s]." Because an individual sued in her individual capacity is plainly a "person," the statute simply cannot be read to limit monetary relief in the manner suggested by petitioner. *Monell*, 436 U.S. at 700-701 (Section 1983 "provide[s] a remedy, to be broadly construed, against all forms of official violation of federally protected rights") (emphasis added). Indeed, "the central purpose of the Reconstruction-Era laws is to provide compensatory relief to those deprived of their federal rights by state actors." *Felder v. Casey*, 487 U.S. 131, 141 (1988). See also *Owen v. City of Independence*, 445 U.S. 622, 651 (1980) ("[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees").

Petitioner's construction of the statute would effectively eliminate damages as a remedy for violations of Section 1983. The "under color of" state law requirement limits the reach of Section 1983 to official conduct. If a personal capacity action may not be maintained when the plaintiff's claim is grounded in official acts of state officers, such an action could never be maintained under Section 1983. That would be a dramatic—and entirely unjustified—change in the law. See, e.g., *Malley v. Briggs*, 475 U.S. 335 (1986) (recognizing that state officers may be subject to personal liability for acts within their official capacities); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (same).<sup>5</sup>

<sup>5</sup> Indeed, if petitioner's argument were correct, there would have been no need for this Court to hold that government officers are in certain circumstances immune from damages liability for their official acts (see, e.g., *Davis v. Scherer*, 468 U.S. 183 (1984)) because, under petitioner's view, no dam-



Finally, to the extent petitioner's argument rests on some sort of immunity rationale, this Court already has determined the appropriate contours of state officials' immunity from personal damages liability. See, e.g., *Davis v. Scherer*, 468 U.S. 183 (1984). There is no justification whatsoever for the total evisceration of the damages remedy that would result from the approach advocated by petitioner.<sup>6</sup>

**B. This Court's Decision In *Will* Provides No Support For Petitioner's Reworking Of Section 1983.**

Petitioner's entire argument rests on this Court's decision in *Will v. Michigan Dep't of State Police*, *supra*. Yanking a single phrase out of the Court's opinion, petitioner argues that the Court held "that a state officer may not be sued in his personal capacity under 42 U.S.C. § 1983 for acts committed in the performance of the officer's official state duties." Pet.

ages claim may *ever* be asserted against a government official in such circumstances. The Court's immunity decisions squarely recognize that in the absence of immunity such officials would be subject to liability in damages. Those decisions thus support the conclusion that petitioner's contention should be rejected.

<sup>6</sup> Petitioner appears to suggest (Br. 16-17) that the "official acts" category includes only conduct consistent with state law, so that a personal capacity action could be brought where the state officer violated state law as well as the Constitution. But nothing in Section 1983 indicates that Congress intended to make personal liability turn on the peculiarities of state law. Cf. *Davis v. Scherer*, 468 U.S. at 193-196 (state official not divested of immunity from damages liability by violation of state law); *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980). Indeed, petitioner's approach would mean that damages could not be recovered where the unconstitutional act was the result of state policy, arguably the situation in which liability is *most* appropriate.

Br. 13. That construction of the opinion is plainly wrong.

*Will* presented two questions: whether a State is a "person" within the meaning of Section 1983 and whether a state officer sued in her official capacity is a "person" subject to liability under that statute. The Court answered both questions in the negative. After establishing that the State itself was not a "person," the Court turned to the claim "that state officials should be considered 'persons' under § 1983 even though acting in their official capacities," noting that the complaint in *Will* included as a defendant "the Director of State Police in his official capacity." 491 U.S. at 70. The Court observed that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Id.* at 71. Concluding that such an action "is no different from a suit against the State itself," the Court held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Ibid.*

*Will* applies only where—as in that case—the plaintiff asserts a claim for damages against a state official in her official capacity. Thus, the Court's reference to "officials acting in their official capacities" is a reference to the capacity in which the official is acting *in defending the lawsuit*, not a reference to the capacity in which the official acted when she engaged in the conduct that is the subject of the lawsuit. *Will* simply holds that, in the context of an action for damages, a state officer *sued* in his official capacity is not a "person" within the meaning of Section 1983. *Will* does not hold that the capacity in which the defendant is sued must be the same as the

capacity in which she was acting when she engaged in the conduct underlying the suit.

Petitioner argues (Br. 18) that the present case should be controlled by *Will* because the immunity from damages liability recognized in that case could otherwise "be circumvented by [the] mere pleading device" of filing suit against the officer in her personal capacity. But, as this Court explained in detail in *Kentucky v. Graham*, *supra*, the difference between an official capacity action and a personal capacity suit is not merely a difference in pleading. The two types of actions are substantively distinct. A personal capacity action is a suit in which the individual is personally liable and may assert certain personal defenses, such as absolute or qualified immunity. *Graham*, 473 U.S. at 165, 166-167. An official capacity action, by contrast, is in essence a suit against the governmental entity and the defendant may assert defenses available to the government entity. *Id.* at 165-166.

*Will* recognized that an official capacity action is "a suit against the official's office" and "[a]s such, it is no different from a suit against the State itself." 491 U.S. at 71. For that reason, the Court saw "no reason to adopt a different rule" than the one applicable to Section 1983 suits against States. *Ibid.* There is, by contrast, an important reason why the same rule should not apply to personal capacity actions. Personal capacity actions are *not* suits against the government, but rather suits against individuals. A rule grounded in the determination that states may not be sued under Section 1983 is entirely irrelevant to whether a damages action may be brought against individuals. Indeed, it long has been recognized that the opposite rule applies with respect to individuals:

they *are* subject to suits for damages under that statute. For these reasons, *Will* provides no support for petitioner's contention in this case.<sup>7</sup>

## II. THIS COURT NEED NOT REVIEW THE COURT OF APPEALS' DETERMINATION THAT PETITIONER WAS SUED IN HER PERSONAL CAPACITY AND, IN ANY EVENT, THE COURT OF APPEALS' DETERMINATION IS CORRECT

Amici National Association of Counties, et al. (NAC), does not support petitioner's argument grounded in *Will*. Rather, NAC contends that the court of appeals erred in holding that these actions were instituted against petitioner in her personal capacity. Petitioner plainly did not seek review of that issue by this Court. It is not "fairly in-

<sup>7</sup> Petitioner suggests (Br. 10, 19-20) that the Eleventh Amendment and policy considerations have some bearing on resolution of the question presented in this case. Both factors are irrelevant. The Eleventh Amendment does not bar damages claims against a state officer in her personal capacity. *Scheuer v. Rhodes*, 416 U.S. at 237-238. See also *Kentucky v. Graham*, 473 U.S. at 166-167.

Petitioner's policy arguments, even if they were persuasive, could not trump Congress's clear intent as expressed in the language of Section 1983. See, e.g., *Pinter v. Dahl*, 486 U.S. 622, 654 (1988). Moreover, there is no merit to the contention that government officials should not be subjected to personal liability for injury caused by unconstitutional official action. The very purpose of Section 1983 was to provide a federal remedy for state officials' constitutional violations. *Felder v. Casey*, 487 U.S. at 139; *Monroe*, 365 U.S. at 180. Indeed, even in the absence of a congressional directive, this Court has concluded that federal officials should be held liable in such circumstances. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Policy considerations thus weigh strongly *against* petitioner's effort to restrict the Section 1983 remedy.



cluded" within the questions presented and was not even mentioned in the certiorari petition.<sup>8</sup> That is more than sufficient to pretermitt consideration of the issue by this Court. Sup. Ct. R. 14.1(a) ("[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court").

No doubt recognizing that it faces a formidable hurdle in urging the Court to decide a question not presented in the certiorari petition, NAC argues that the issue is "jurisdictional," apparently on the ground that it supposedly involves the Eleventh Amendment. To begin with, it is not at all clear that the claim in any way relates to the Eleventh Amendment.<sup>9</sup> But even if it did, this Court has "never held that [an Eleventh Amendment issue] is jurisdictional in the sense that it must be raised and decided by this Court on its own motion." *Patsy v. Florida Board of Regents*, 457 U.S. 496, 516 n.19 (1982) (declining to address Eleventh Amendment issue).

Here, moreover, there can be no claim that this Court lacks jurisdiction over the case. As NAC itself acknowledges (Br. 3), the complaint filed by six of the respondents satisfies even NAC's stringent

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<sup>8</sup> As discussed above, petitioner's contention is that the allegations of the complaint are irrelevant because a plaintiff may not assert a personal capacity claim against a state officer for conduct performed in the officer's official capacity. Pet. 10-11.

<sup>9</sup> The Eleventh Amendment confers substantive protections which, as we have discussed (see note 7, *supra*), are not implicated in personal capacity actions like the present case. Since the Amendment does not apply to personal capacity actions, it is impossible to see how the Amendment could impose special pleading requirements in such actions.

pleading standard. See Pet. App. A15; J.A. 41 (¶ 33).<sup>10</sup> Because the case indisputably is properly before the Court as to some of the respondents, there is no need for the Court to consider NAC's argument. *Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297, 302-305 (1983) (where one party had standing to urge review of merits of lower court decision, the Court's jurisdiction was clear and there was no need to determine whether other party had standing to seek review). That question should be left to be decided in a case in which it is properly presented.

Turning to the merits of NAC's argument, the court of appeals' construction of respondents' complaints was entirely proper. NAC recognizes (Br. 4) that this court in *Kentucky v. Graham, supra*, "meticulously delineated the distinctions between personal and official capacity civil rights actions against state officials." In the course of cataloging the different characteristics of these actions, the Court squarely addressed the issue raised by NAC, stating that "[i]n many cases, the complaint will not clearly specify whether officials are sued personally, in their official capacity, or both. 'The course of proceedings' in such cases typically will indicate the nature of the liability sought to be imposed." 473 U.S. at 167 n.14 (quoting *Brandon v. Holt*, 469 U.S. at 469).

The court below applied the *Graham* standard, analyzing the language of the complaints and observing that petitioner herself had treated the complaints as raising personal-capacity claims, and concluded that the complaints stated damages claims against

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<sup>10</sup> That complaint expressly asserted claims against petitioner in her "personal capacity." J.A. 41. See page 4, *supra*.



petitioner in her personal capacity. Pet. App. A15-A17. The same approach is utilized by a majority of the courts of appeals that have addressed the question. *Melton v. City of Oklahoma City*, 879 F.2d 706, 726-727 & n.29 (10th Cir. 1989), reh'g granted in part on other grounds, 888 F.2d 724 (10th Cir. 1989) (en banc); *Conner v. Reinhard*, 847 F.2d 384, 394 n.8 (7th Cir.), cert. denied, 488 U.S. 856 (1988); *Lundgren v. McDaniel*, 814 F.2d 600, 603-604 (11th Cir. 1987). But see *Wells v. Brown*, 891 F.2d 591, 593 (6th Cir. 1989); *Nix v. Norman*, 879 F.2d 429, 431 (8th Cir. 1989).

NAC argues that *Graham* misstated the law and that the plaintiff in every case must expressly specify the capacity in which suit is brought against a state officer. This contention is grounded in Rule 9(a) of the Federal Rules of Civil Procedure, which requires that the capacity of a party to be sued must be averred "to the extent required to show the jurisdiction of the court." But federal courts have jurisdiction over both official capacity and personal capacity suits. The capacity in which suit is brought simply controls some aspects of the action, such as the nature of the available relief. *Kentucky v. Graham*, 473 U.S. at 165-168. Moreover, NAC's argument would require every complaint seeking damages from a state officer to include an allegation that the action is brought against the officer in her personal capacity, even though—as the court of appeals observed (Pet. App. A16)—the most natural reading of a complaint that simply names the individual is that it seeks relief against the individual in her personal capacity. An allegation regarding capacity is not required by Rule 9(a). NAC's argument should be rejected.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 90-681

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

BARBARA HAFFER,

*Petitioner,*

v.

JAMES C. MELO, JR. and CARL GURLEY, *et al.*,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit

MOTION FOR LEAVE TO FILE A BRIEF  
AS *AMICUS CURIAE* AND BRIEF FOR THE  
AMERICAN FEDERATION OF LABOR AND  
CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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**On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit**

---

**MOTION FOR LEAVE TO FILE A BRIEF  
BY THE AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AS *AMICUS CURIAE***

---

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") moves for leave to file the attached brief *amicus curiae* in support of respondents. Respondents have granted their consent to the filing of said brief. Petitioner has refused her consent. In support of this motion the AFL-CIO states as follows:



1. The AFL-CIO is a federation of 90 national and international unions with a total membership of approximately 13,000,000 working men and women; many of these workers, like the plaintiffs-respondents in the instant case, are employed in the public sector. These workers have a vital interest in being able to rely on 42 U.S.C. § 1983 for the vindication of their constitutional and statutory rights under federal law, both in their capacities as public employees and as members of the general public.

2. The arguments advanced by petitioner in this case—that state officials sued for damages in their personal capacities for the misuse of state office are not “persons” within the meaning of § 1983, and that such officials are in any event shielded from such personal liability by the Eleventh Amendment—would destroy the very right of action against state officials that Congress intended to create in enacting § 1983. The attached brief *amicus curiae* is primarily devoted to a detailed review of this Court’s precedents showing that the result sought by petitioner would require the Court to overrule a long and unbroken line of decisions recognizing both the inapplicability of the Eleventh Amendment to § 1983 personal-capacity suits against state officials, and the congressional purpose to hold state officials personally liable in damages under § 1983 when such officials deprive other persons of their federal rights under color of state law.

3. Petitioner contends too that the drastic result she seeks is compelled by this Court’s recent decision in *Will v. Michigan Dep’t. of State Police*, 491 U.S. 58 (1989). As we also show in the accompanying *amicus curiae* brief, however, the *Will* Court did not purport to overrule, or provide any basis for overruling, the unbroken line of this Court’s decisions noted above. *Will* only goes so far as to establish that Congress did not as a matter of statutory construction intend to subject the *State itself* to damages liability under § 1983. Where, as here, a § 1983 plaintiff seeks to hold a state official *personally* liable in damages for her official acts, *Will* is inapposite.

## CONCLUSION

For the above stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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**On Writ of Certiorari to the  
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for the Third Circuit**

---

**BRIEF FOR THE AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS**

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**INTEREST OF THE *AMICUS CURIAE***

The interest of the American Federation of Labor and Congress of Industrial Organizations in this case is set forth in the foregoing motion for leave to file this brief.

**SUMMARY OF ARGUMENT**

Petitioner seeks to press into her service the decision in *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), as support for two propositions each of which has been rejected by this Court in a long line of unbroken decisions. Those propositions are (1) that a

state executive official performing state functions is not a "person" under 42 U.S.C. § 1983 when sued for damages *in her personal capacity*; and (2) that such a state official is in any event shielded from personal liability in a federal court § 1983 action by operation of the Eleventh Amendment.

I. *Will*, first of all, was a statutory case, *not* an Eleventh Amendment case. The Eleventh Amendment by its terms applies only to actions "against one of the United States." Following this plain language, this Court has repeatedly and consistently held that federal court suits against state officials *in their personal capacities* are not barred by the Eleventh Amendment. See pp. 5-7, *infra*. *Scheuer v. Rhodes*, 416 U.S. 232 (1974), is perhaps the most familiar and pertinent example. *Scheuer* held that the Eleventh Amendment imposes no bar on a § 1983 damages action seeking to hold the Governor of Ohio and other "high" state executive officials personally liable in damages for their official acts.

II. Petitioner's statutory argument is foreclosed by an even longer and equally unbroken line of this Court's precedents; again *Scheuer v. Rhodes*, *supra*, comes most readily to mind. See pp. 9-11, *infra*.

This Court has repeatedly recognized that *the very purpose* of Congress in enacting § 1983 was to create a vehicle through which persons deprived of their federal rights could obtain appropriate relief against the public officials responsible for that deprivation. See pp. 12-16, *infra*. *Scheuer* is particularly instructive because the Court there confirmed that even the "highest" state executive officers have no license to violate established federal rights without having to answer personally for their transgressions under § 1983.

Petitioner's statutory argument thus rests on the supposition that *sub silentio Will*, *supra*, overruled not only the cases explicitly recognizing the congressional purpose

to subject state officials as a class to personal liability under § 1983, but also the numerous other cases decided by this Court that are meaningless if such officials are not within the ambit of § 1983, such as the Court's personal immunity cases. See pp. 16-19, *infra*.

But as we show the *Will* Court did not purport to overrule, or provide any basis for overruling, these cases. *Will* only goes so far as to establish that Congress in enacting § 1983 did not intend to subject *the State itself* to damages liability, either by a direct action against the State or by an official-capacity action against a state official. *Will*, 491 U.S. at 64-71. Where, as here, a § 1983 plaintiff seeks to hold a state official *personally* liable in damages for her official acts, *Will* is inapposite. See pp. 19-21, *infra*.

III. Finally, implicit in petitioner's brief is the argument that if she is a "person" under § 1983 when sued for her official acts—which she plainly is—she is nevertheless entitled under the circumstances of this case to assert a defense of absolute immunity. *Scheuer v. Rhodes*, *supra*, however, explicitly rejected such a claim of absolute immunity by state executive officers, including the chief executive officer of the State. *Scheuer* is thus again dispositive. See pp. 23-25, *infra*.

Under *Scheuer* and its progeny, petitioner is, of course, entitled to assert a defense of *qualified* immunity. The qualified immunity defense afforded by this Court's precedents to state executive officials is broad in scope and hence more than adequate to address the public policy considerations raised by petitioner to the extent that those considerations have force. As the Court found in *Scheuer*, "§ 1983 would be drained of meaning" were the Court to hold state executive officials absolutely immune from damages liability under the statute. 416 U.S. at 248. See pp. 25-26, *infra*.

## ARGUMENT

Section 1983 provides that:

*Every person who under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.* [42 U.S.C. § 1983 (emphasis added).]

In *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70-71 (1989), the Court held—as a matter of statutory construction—that a State and a state official sued for damages in his official capacity are not “persons” subject to suit under § 1983. *Will*, in other words, establishes that § 1983 can not be used to impose liability in damages on a State *qua* State, either by a direct action against the State or by an official-capacity action against a state official. *Id.*

Petitioner Barbara Hafer contends that *Will* also establishes that she may not be held *personally* liable in damages under § 1983 for her official actions as Auditor General of the Commonwealth of Pennsylvania that allegedly violated respondents’ First Amendment rights. Petitioner contends that this result is compelled by *Will* “both as a matter of statutory construction and by application of the Eleventh Amendment [to the United States Constitution].” Brief for Petitioner (“Pet. Br.”) at 9.

Petitioner’s reading of *Will* would expand the reach of that case far beyond its holding and by so doing would place *Will* at odds with two well established lines of this Court’s precedents. *Will*, first of all, was a statutory case, not an Eleventh Amendment case. Thus, *Will* was not intended to overrule the long line of this Court’s prece-

dents holding that § 1983 suits against state officials *in their personal capacities* are not barred by the Eleventh Amendment. Nor did *Will* purport to overrule, or provide any basis for overruling, the even longer line of this Court’s precedents holding that § 1983 suits may be brought against state officials *in their personal capacities* for actions taken in the conduct of their offices.

Because it is important at the outset to show that this case does *not* implicate any constitutional question, we address petitioner’s Eleventh Amendment argument first; we then proceed to analyze the issue of statutory construction presented.

1. (a) Petitioner relies on *Will* as support for her Eleventh Amendment argument. Pet. Br. at 8-9. But, as just noted, *Will* was a statutory and not an Eleventh Amendment case. See *Will*, 491 U.S. at 63-64 (“Petitioner filed the present § 1983 action in Michigan state court, which places the question whether a State is a person under § 1983 squarely before us since the Eleventh Amendment does not apply in state courts.”).

The *Will* Court thus had no occasion to consider and hence did not even purport to consider whether the Eleventh Amendment shields state officials sued for damages in their personal capacities under § 1983. Petitioner, moreover, cites no Eleventh Amendment authorities in support of her position that the Amendment provides such a shield for state officials in these circumstances.

The absence of such authority is not surprising. The Eleventh Amendment by its terms has no application to this case. The Amendment provides in full:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted *against one of the United States* by Citizens of another State, or by Citizens or Subjects of any Foreign State. [emphasis added].

This is a suit for damages against a state official *in her personal capacity*. Thus, this is *not* a suit against “one



of the United States" within the meaning of the Eleventh Amendment. It bears emphasis, too, that because no recovery is sought from the state treasury through the artifice of suing petitioner *in her official capacity*, the State is *not* the real party in interest.

(b) Following the plain language of the Eleventh Amendment, this Court has repeatedly and consistently rejected the precise argument advanced by petitioner here, *viz.*, that the Eleventh Amendment bars a federal court § 1983 damages suit against a state executive official in his personal capacity. *Scheuer v. Rhodes*, 416 U.S. 232 (1974), is perhaps the most familiar example.

In *Scheuer*, the plaintiffs brought a § 1983 damages action in federal court against the Governor of Ohio and other state executive officers "seeking to impose individual and personal liability on the *named defendants*." *Id.* at 238 (emphasis in original). The Court emphasized the "well established" rule that the Eleventh Amendment is a bar to suit in federal court *only* when the State itself is the named defendant or the real party in interest. Conversely, where the plaintiff seeks to impose *personal* liability on a state official, the Eleventh Amendment does *not* come into play:

[S]ince *Ex parte Young*, 209 U.S. 123 (1908), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law. *Ex parte Young* teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." [416 U.S.

at 237 (quoting *Ex Parte Young*, 209 U.S. at 159-60) (emphasis in original).]

See also *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 50 (1944) (official-capacity suit brought in federal court against state tax collector is barred by Eleventh Amendment since recovery is sought from state treasury; however, such an official-capacity suit "is plainly distinguishable [for Eleventh Amendment purposes] from those to recover personally from a tax collector money wrongfully exacted by him under color of state law"); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 462 (1945) ("Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally."); accord *Edelman v. Jordan*, 415 U.S. 651, 663-69 (1974); *Quern v. Jordan*, 440 U.S. 332, 345 n.17 (1979).

2. Petitioner's statutory construction argument that state officials may not be held personally liable in damages under § 1983 for their official actions is foreclosed by an even longer and equally unbroken line of this Court's precedents; again, *Scheuer v. Rhodes* is a particularly pertinent example.

(a) We pause to note that the breadth and implications of petitioner's statutory construction argument are somewhat unclear. Petitioner's bottom line position appears to be that "state officials" who act in their official capacities as employees of the State *as a class* are not "persons" under § 1983. Thus, says petitioner, such state officials may not be held personally liable in damages under the statute for such actions. See Pet. Br. at 10-13. This position, in turn, is derived from two separate lines of argument.

First, petitioner argues that since Congress out of solicitude for the unique constitutional status of the States did not intend to subject *the State itself* to dam-

ages liability under § 1983—as the Court held in *Will*, *supra*—Congress could not at the same time have intended to subject *state officials* who are critical to the functioning of state government to such liability. To impute such an intent to Congress, the argument goes, would mean that Congress was prepared in enacting § 1983 to impinge upon “the exercise by state officials of their authority and responsibility to manage the affairs of state government in an efficient and orderly manner,” contrary to “the concepts of federalism implicit in the restrictions of the Eleventh Amendment.” Pet. Br. at 9.

This line of argument would appear to be confined to that class of public officials *employed directly by the State*—and perhaps confined even further to those public officials holding “high” state office, however defined—to the exclusion of public officials employed by political subdivisions of a State, such as municipalities and school boards, that do not share in the States’ Eleventh Amendment immunity.

Second, petitioner’s brief, as we read it, makes the argument that it is somehow unfair or imprudent as a matter of public policy to subject state officials performing state functions to *personal* liability under § 1983, on the theory that an official is but an instrument of his governmental employer and should not be subject to *personal* liability when acting within the scope of his employment. Thus, petitioner argues that, as a matter of public policy, “[d]amages for alleged deprivation of civil rights should be payable, if at all, by the State, *not the official capacity actor*, and Congress has the power to enact [such] legislation.” Pet. Br. at 20 (emphasis in original).

Petitioner’s second argument, then, is, in essence, that the States should be subject to vicarious liability under § 1983 *to the exclusion of state officials*. This argument—though by its terms also limited to “state officials”—has broader implications than the first, and would as a matter of logic encompass *all* public officials acting “under

color of state law” within the meaning of § 1983, including municipal officials.

Whatever the precise contours of petitioner’s statutory argument, that argument, as we now show, is foreclosed by the many cases in this Court that have recognized repeatedly that public officials who abuse the powers of their office are, as a class, the very “persons” Congress intended to reach when the Legislature enacted § 1983. Under this consistent line of authority, *all* such public officials are within the ambit of § 1983, and *all* such officials may in appropriate circumstances be held *personally* liable under the statute for their official acts that deprive other persons of the rights, privileges and immunities secured by the Constitution and laws of the United States.

(b) To the extent that petitioner seeks to carve out an exemption from § 1983 for state officials—or perhaps a more narrow exemption for “high” state officials—petitioner’s position has been explicitly rejected by this Court in *Scheuer v. Rhodes*, *supra*. Indeed, in all pertinent respects, *Scheuer* is on all fours with the instant case.

As discussed earlier, *Scheuer* was a § 1983 suit for damages against the *chief executive officer* of the State of Ohio and other state executive officers in their personal capacities. The precise conduct challenged in *Scheuer* was the decision of Governor Rhodes and the other state defendants to deploy the Ohio National Guard to quell civil disturbances at Kent State University. See 416 U.S. at 235-36. There was no dispute in *Scheuer*—as there is no dispute here, see Pet. Br. at 14-15 & nn. 20-21—that in ordering the deployment of the National Guard, the defendants had acted in their official capacities as executive officers of the State of Ohio, and that those officials were being sued for damages in their personal capacities for their official acts.

In addition to asserting a right to absolute immunity from suit under § 1983 by operation of the Eleventh



Amendment—which the Court rejected, *see* pp. 6-7, *supra*—the *Scheuer* defendants also asserted a right to absolute “executive” immunity. 416 U.S. at 238. This absolute immunity claim was premised on the very arguments offered by petitioner here as to why she should not be subject to personal liability under § 1983 for actions taken in her official capacity as Auditor General of Pennsylvania. The *Scheuer* defendants stressed “the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion,” and “the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.” 416 U.S. at 240.

Citing its earlier decision in *Monroe v. Pape*, 365 U.S. 167 (1961)—which held that Congress’ intent in enacting § 1983 was to authorize suits for damages in federal court *against public officials* who abuse their public office in a manner that deprives other persons of their constitutional rights—the *Scheuer* Court rejected the state officials’ immunity claim. The Court reasoned that to recognize such a blanket immunity from suit under § 1983 would be to “drain[] of meaning” (*id.* at 248), *Monroe*’s conclusion that public officials could be held personally liable in damages for their misuse of public office:

[D]amages against individual defendants are a permissible remedy [under § 1983] in some circumstances notwithstanding the fact that they hold public office. . . . In some situations a damage remedy can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another.

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It can hardly be argued, at this late date, that under no circumstances can the officers of state government be subject to liability under this statute. In *Monroe v. Pape*, *supra*, MR. JUSTICE DOUGLAS, writing

for the Court, held that the section in question was meant “to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official’s abuse of his position.” 365 U.S., at 172. Through the Civil Rights statutes, Congress intended “to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.” *Id.*, at 171-172.

Since the statute relied on thus included within its scope the “[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law,” *id.*, at 184 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)), governmental officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms. [416 U.S. at 238, 243.]

Significantly in this regard, the *Scheuer* Court must have been proceeding on the assumption that a State is not a “person” under § 1983, as the *Will* Court later made explicit. At the time of *Scheuer* the Court had already held in *Monroe v. Pape*, *supra*, 365 U.S. at 187-92, that municipalities were not “persons” under § 1983. And if Congress had not intended § 1983 to reach municipalities, it follows *a fortiori* that Congress could not have intended § 1983 to reach the State itself. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 452 (1976); *see also Will*, 491 U.S. at 62, 70. *Will*’s holding that the States *qua* States are not persons under § 1983 thus creates no new principle of law that warrants a reexamination of *Scheuer*’s holding that a state official sued in his personal capacity is a person for § 1983 purposes.<sup>1</sup>

<sup>1</sup> In an effort to divorce this case from *Scheuer*, and to bring the case within *Will*’s holding, petitioner frames her statutory argument in terms of whether she is a “person” under § 1983 when engaged in official acts, and not in terms of whether she is entitled to assert an



(c) Four years after *Scheuer*, the Court held in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690-95 (1978), that municipalities are "persons" under § 1983, thus reopening the question of whether a State might also be a § 1983 "person." See *Will*, 491 U.S. at 61-63, 70. But while the status of public entities under § 1983 has been in flux, the constant has been that state and municipal officials are subject to personal liability under § 1983. Thus, the Court has recognized that the answer to the question whether a public entity is a "person" under § 1983 does not govern the answer to the question whether a public official sued in her personal capacity is a "person."

The reason is clear. The very purpose of Congress in enacting § 1983 was to create a vehicle through which persons deprived of their federal rights could obtain appropriate relief—whether it be damages or injunctive relief—against the public officials responsible for that deprivation. In this sense, *Scheuer* merely adds that even the "highest" state executive officers have no license to

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absolute immunity defense. Petitioner's argument is thus in one sense broader than the state executive officials' argument in *Scheuer*. If state officials are not "persons" within the meaning of § 1983, they could never be held personally liable in damages in a § 1983 suit. In contrast, if such officials are "persons" who are nevertheless entitled to assert an absolute "executive" immunity defense, they could be held liable in appropriate circumstances, such as when performing "nonexecutive" functions, or when the immunity defense has been waived.

As we show in text, however, the Court's decision in *Scheuer* disposes of any claim that state executive officials cannot as a rule be held personally liable in damages under § 1983, whether that claim is framed in terms of the statutory "person" language, or in terms of an entitlement to absolute "executive" immunity. In this section of the brief, we have relied on *Scheuer* specifically to address petitioner's "person" argument. In Part 4, *infra*, we rely on *Scheuer* yet again to address the distinct argument, implicit in petitioner's brief, that even if she is a "person" under § 1983, she is entitled to absolute immunity under the circumstances of this case.

violate established federal rights without having to answer personally for their transgressions under § 1983.

The landmark decision of the Court on this issue—and the one directly relied upon by the Court in *Scheuer*—was *Monroe v. Pape*, *supra*. *Monroe* was a § 1983 suit for damages against 13 individual police officers and the City of Chicago. The police officers sued in *Monroe* were municipal officials—and not as in *Scheuer* state officials—and the issue before the Court was framed in terms of whether Congress had intended to create a remedy under § 1983 for an "official's" abuse of office, without regard to whether the official was employed by the State or by one of its political subdivisions:

The question with which we now deal is . . . whether Congress, in enacting [§ 1983], meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. [365 U.S. at 172.]

The *Monroe* Court, after a thorough review of the statute's legislative history, found that § 1983's *raison d'être* was to create a federal right of action against public officials—"those who carry a badge of authority of a State and represent it in some capacity" (*id.* at 172)—who misuse the power of their office to deprive persons of their federal rights, (*id.* at 174-87). Thus, for example, *Monroe* quotes the statement of Mr. Hoar of Massachusetts explaining the purposes of § 1983 as follows:

Now, it is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend such protection. If every sheriff in South Carolina refuses to serve a writ for a colored man and those sheriffs are kept in office year after year by the people of South Carolina, and no verdict against them for their failure of duty can be obtained before a South Carolina jury, the State of South Carolina, through the

class of officers who are its representatives to afford the equal protection of the laws to that class of citizens, has denied that protection. [365 U.S. at 177 (emphasis added) (quoting Cong. Globe, 42d Cong., 1st Sess. 334).]

Indeed, in *Monroe*, the Court held that *only* the individual police officers who had been accused of violating the plaintiffs' constitutional rights—and *not* the municipality that employed those officers—are “persons” who could be held liable in damages under § 1983. See 365 U.S. at 187-92.

In *Monell*, *supra*, as we have noted, the Court reversed that portion of *Monroe* holding that municipalities are not § 1983 “persons.” See pp. 11-12, *supra*. At the same time, the Court in *Monell* reaffirmed that Congress had unquestionably intended to bring public officials within the statute's sweep. Again canvassing the legislative history of § 1983, the Court observed that the legislative debates reflected that the statute could “without question . . . be used to obtain a damages judgment against state or municipal officials who violated federal constitutional rights while acting under color of law.” 436 U.S. at 682 (emphasis in original). This fact, according to the Court, was apparent to “everyone” who participated in the legislative debates, “proponents and opponents alike.” *Id.* at 700.

The Court has most recently had occasion to review § 1983's legislative history in *Jett v. Dallas Independent School Dist.*, 491 U.S. 701 (1989). The Court's conclusion there was the same: *viz.*, that § 1983 was designed specifically “‘to expose state and local officials to a new form of liability.’” *Id.* at 723 (quoting *Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 259 (1981)).

The congressional purpose to create a new federal remedy against public officials as a class is summarized with admirable clarity and conciseness by Justice White's

concurring opinion in *Imbler v. Pachtman*, 424 U.S. 409 (1976), which, like *Scheuer*, involved the issue of what immunity defenses are available to public officials in actions brought under § 1983:

As the language [of § 1983] itself makes clear, the central purpose of § 1983 is to “give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position.” *Monroe v. Pape*, 365 U.S. 167, 172 (1961) (emphasis added). The United States Constitution among other things, places substantial limitations upon state action, and the cause of action provided in 42 U.S.C. § 1983 is fundamentally one for “[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” *United States v. Classic*, 313 U.S. 299, 326 (1941). It is manifest then that all state officials as a class cannot be immune absolutely from damage suits under 42 U.S.C. § 1983 and that to extend absolute immunity to any group of state officials is to negate *pro tanto* the very remedy which it appears Congress sought to create. *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974). [424 U.S. at 433-34.]

This congressional purpose is also aptly and succinctly stated in *Felder v. Casey*, 487 U.S. 131 (1988), where the Court held that a state statute requiring § 1983 plaintiffs to provide state and local officials and entities with notice of and an opportunity to cure alleged civil rights violations is preempted by federal law. The *Felder* Court found that:

In enacting § 1983, Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations. A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of the federal legislation, is inconsistent in both purposes and effect with



the remedial objectives of the federal civil rights law. [487 U.S. at 153 (emphasis added).]

In *Kentucky v. Graham*, 473 U.S. 159 (1985), the Court described at length the essential nature of personal-capacity suits against public officials under § 1983, and emphasized that such personal-capacity suits are distinct from those that might be brought against *the public entities* employing those officials:

Personal-capacity suits seek to impose personal liability upon a governmental official for actions he takes under color of state law.

\* \* \*

On the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. . . . When it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such as objectively reasonable reliance on existing law.

\* \* \*

A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him. [473 U.S. at 165-68 (emphasis in original) (citations omitted).]

(d) To conclude that state officials as a class are not "persons" under § 1983 would require the Court to overrule not only the cases previously discussed, including *Scheuer*, but also a long and unbroken line of other cases recognizing that state officials in their personal capacities are amenable to § 1983 damages suits.

Thus, for example, the Court has in a line of cases dating back over forty years sought to articulate the scope and nature of the immunity defense available to various state officials in personal-capacity suits brought under § 1983. A critical predicate underlying each of these cases is the recognition that Congress intended in enacting § 1983 to create a federal cause of action against

state officials. Obviously, had this point not been firmly established and well-understood, the Court would never have had occasion in these cases to examine the *defenses* available to state officials sued for damages under § 1983. See, e.g., *Tenney v. Brandhove*, 341 U.S. 367 (1951) (state legislators sued under § 1983 for actions in the legislative sphere may defend on basis of absolute immunity); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (state hospital superintendent sued under § 1983 for actions regarding incarcerated mental patient may defend on basis of qualified immunity); *Procunier v. Navarette*, 424 U.S. 555 (1978) (state prison officials sued under § 1983 for interfering with outgoing prisoner mail may defend on basis of qualified immunity); *Stump v. Sparkman*, 435 U.S. 349 (1978) (state judges sued under § 1983 for actions taken in the judicial sphere may defend on basis of absolute immunity); *Gomez v. Toledo*, 446 U.S. 635, 638-40 (1985) (plaintiff states cause of action for damages against superintendent of state police by alleging that state official—a "person"—deprived plaintiff of a federal right under color of state law; burden is then on state official to plead defense of qualified immunity); *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 734-37 (1980) (state judges sued under § 1983 for official, but non-judicial, acts may defend on basis of qualified immunity); *Davis v. Scherer*, 468 U.S. 183, 190-91 (1984) (state highway official does not lose qualified immunity if he is found to have violated the command of a state administrative regulation); *Malley v. Briggs*, 475 U.S. 334 (1986) (state trooper sued under § 1983 for actions taken in seeking arrest warrant may defend on basis of qualified immunity); *Forrester v. White*, 484 U.S. 219 (1988) (state judges sued under § 1983 for non-judicial employment decisions may defend on basis of qualified immunity); cf. *Owen v. City of Independence*, 445 U.S. 622, 638 n.18, 650-58 (1980) (justifications found in *Scheuer* and its progeny for affording state and municipal officials a qualified im-



munity from suit under § 1983 do not apply in suits against municipalities).

Similarly, in *Smith v. Wade*, 461 U.S. 30 (1983), the Court held that a state corrections officer could be held liable for *punitive* damages under § 1983 for egregious conduct violating the federally protected rights of others. Like the Court's immunity decisions, the decision in *Smith v. Wade* is inexplicable absent the recognition that state officials are "persons" under § 1983 who may in appropriate circumstances be held personally liable in damages.

Many other decisions of this Court are predicated on the same recognition. See, e.g., *City of Greenwood v. Peacock*, 384 U.S. 808, 829-30 (1966) (although civil rights demonstrators may not remove state criminal prosecutions to federal court based on allegations of race discrimination, they are not without a remedy under federal law; "officers of a State who violate the petitioners' federal constitutional and statutory rights . . . may be made to respond in damages [under § 1983]"); *Wolff v. McDonnell*, 418 U.S. 539, 554-55 (1974) (state prisoner deprived of good-time credits by state corrections official is entitled to bring § 1983 damages action against that official); *Robertson v. Wegmann*, 436 U.S. 584, 592 (1978) (application of state survivorship statute that operates to extinguish § 1983 damages action upon the death of the plaintiff will not undermine the deterrent effect of § 1983, because "[a] state official contemplating illegal activity must always be prepared to face the prospect of a § 1983 action being filed against him"); *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982) (persons involuntarily incarcerated in state mental hospital may recover damages against state official in his personal capacity for failure to provide minimally adequate training).

Finally, to the extent that petitioner's argument extends to *municipal* officials in addition to state officials, see pp. 8-9, *supra*, many other decisions of this Court recognizing the amenability of municipal officials to § 1983

damages actions, including *Monroe v. Pape*, *supra*, would have to be reexamined. See, e.g., *Pierson v. Ray*, 386 U.S. 547 (1967) (municipal judge sued for damages under § 1983 may assert absolute immunity for acts taken in his judicial capacity, but local police officers may assert only qualified immunity); *Carey v. Piphus*, 435 U.S. 247, 264-67 (1978) (public school officials sued for damages under § 1983 for alleged violation of procedural due process may be held liable only for nominal damages absent proof of actual injury); *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) (although plaintiff subjected to a "chokehold" by Los Angeles police officers in alleged violation of his constitutional rights may not seek prospective relief against future violations, "[i]f [plaintiff] has suffered an injury barred by the Federal Constitution, he has a remedy for damages under § 1983"); *Memphis Community School District v. Stachura*, 477 U.S. 299, 310 (1986) (in assessing compensatory damages against individual school board members and administrators in action brought under § 1983, jury may not be instructed to consider the abstract "value" or "importance" of the constitutional rights at issue); *Howlett v. Rose*, — U.S. —, 110 S. Ct. 2430, 2444 (1990) (state court has jurisdiction over § 1983 damages action against individual school board officials and thus "is fully competent to provide the remedies the federal statute requires").

3. (a) Against this unbroken line of authority, petitioner places total reliance on language from *Will*, *supra*, that is taken out of context. See Pet. Br. at 12-13. As noted earlier, the principal issue before the Court in *Will* was whether *the State itself* is a "person" under § 1983. The Court in *Will* answered this question in the negative. In so doing, the Court relied on a number of factors, including the awkwardness of reading the term "person" as used in § 1983 to include the States, the fact that Congress enacted § 1983 to provide a federal forum for civil rights actions while cognizant of the principle that

the States are immune from suit in federal court under the Eleventh Amendment, and the legislative history of § 1983, which gives no indication that Congress contemplated damages suits against the State itself. See 491 U.S. at 64-69.

These factors provide no support to petitioner's contention that state officials sued in their personal capacities are not "persons" under § 1983. First, there is obviously no awkwardness in reading the statutory term "person" to include state officials sued in their personal capacities; indeed, a contrary conclusion would be quite remarkable. Second, Congress could not have thought when it enacted § 1983 that state officials were immune from suit in federal court under the Eleventh Amendment. See Part 1, *supra*. Third, as the Court observed in *Will*, the legislative history affirmatively shows that Congress contemplated damages suits against state officials in their personal capacities. See *Will*, 491 U.S. at 68; see also pp. 13-14, *supra*.

The Court did hold in *Will* that state officials sued for damages in their official capacities are not "persons" within the meaning of § 1983. This holding, however, was nothing more than a reaffirmation of the Court's judgment that Congress did not intend to subject the State itself to liability in damages under § 1983:

Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon v. Holt*, 469 U.S. 464, 471 (1985). As such, it is no different from a suit against the State itself. See, e.g., *Kentucky v. Graham*, 473 U.S. 159, 165-166 (1985); *Monell, supra*, at 690, n.55. We see no reason to adopt a different rule in the present context, particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device. [491 U.S. at 71.]

A suit against a state official in her personal capacity is not a suit "against the State itself," see *Kentucky v. Graham, supra*, 473 U.S. at 165-66, and nothing in *Will* can fairly be read to suggest that a state official is not a "person" when sued in that capacity.

Because she cannot rely on the holding or the reasoning of *Will*, petitioner seizes on the last sentence of the Court's opinion, where the Court summarized its holding in the following words: "We hold that neither a State nor its officials acting in their official capacities are 'persons' under § 1983." 491 U.S. at 71 (emphasis added). In context, however, it is clear that the Court did not mean to imply that § 1983 does not authorize suits against state officials in their personal capacities for their official actions. That issue was not even before the Court in *Will*, and there is no reason to suspect that the Court intended *sub silentio* to overrule dozens of its precedents—dating back more than thirty years—recognizing that state officials may be held personally liable in damages under § 1983 for their official actions that violate other persons federal rights.<sup>2</sup>

(b) Ultimately, petitioner's statutory construction argument reduces to the proposition that States (and, presumably, municipalities as well) should as a matter of

<sup>2</sup> Equally without merit is petitioner's complaint that to allow personal capacity suits against state officials for their official actions would run afoul of the Court's admonition in *Will* that congressional intent should not be circumvented through a mere pleading device. See Pet. Br. at 18. This complaint misses the point of *Kentucky v. Graham, supra*, that personal-capacity and official-capacity suits are two entirely distinct forms of actions seeking recovery against different parties. See 473 U.S. at 165-68, quoted at p. 16, *supra*. In choosing to sue a state official in his or her personal capacity, a § 1983 plaintiff is not seeking to avoid the holding in *Will* (or any other case for that matter) through a mere pleading device. Rather, the plaintiff is bringing a lawsuit against an entirely distinct party in which judgment may be secured and executed only against the official's personal assets. *Id.* at 162, 166.



public policy be held vicariously liable for the constitutional torts of their officials, and that such vicarious liability should *displace* the individual responsibility of officials for their tortious conduct. However that may be, the Congress that enacted § 1983 made the *contrary* policy judgment to hold public officials personally liable in damages when they violate other persons' federal rights. See pp. 9-16, *supra*. This Court is without power to override that policy judgment. See *Tower v. Glover*, 467 U.S. 914, 922-23 (1984) ("We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate."); *Malley v. Briggs*, *supra*, 475 U.S. at 342 ("We reemphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice . . .").

Indeed, given the congressional intent to incorporate tort law principles in § 1983, Congress could not have been expected to make the policy judgment here advocated by petitioner. Holding state officials personally liable for their official acts that violate federal rights is fully consistent with the bedrock tort law principle that "a man [is] responsible for the natural consequences of his actions." *Monroe v. Pape*, *supra*, 365 U.S. at 187.<sup>3</sup> Under traditional tort law principles, the doctrine of *respondeat superior* may be applicable in appropriate circumstances "to broaden" the liability of the individual tortfeasor "by imposing it upon an additional, albeit innocent, defendant." *Prosser and Keeton on the Law of Torts*, Chp. 12, at 499 (5th ed. 1984). However, in no sense does such *respondeat superior* liability *displace* the primary liability of the individual tortfeasor:

A corporate officer is individually liable for the torts he personally commits and cannot shield himself be-

<sup>3</sup> Cf. *Westfall v. Erwin*, 484 U.S. 292, 295 (1988) ("absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct").

hind a corporation when he is an actual participant in the tort. . . . The fact that an officer is acting for a corporation also may make the corporation vicariously or secondarily liable under the doctrine of *respondeat superior*; it does not however relieve the individual of his responsibility. [*Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir. 1978) (citations omitted); accord *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 744 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *United States v. Pollution Abatement Services*, 763 F.2d 133, 135 (2d Cir. 1985), *cert. denied*, 474 U.S. 1037 (1985); *A & M Records, Inc. v. M. V. C. Distributing Corp.*, 574 F.2d 313, 315 (6th Cir. 1978).]

4. Implicit in petitioner's brief is the argument that if she is a "person" under § 1983 when sued in her personal capacity for her official acts—which, we have shown, she plainly is—she is nevertheless entitled under the circumstances of this case to assert a defense of absolute immunity. See n.1, *supra*. *Scheuer v. Rhodes*, *supra*, however, expressly forecloses any such assertion of absolute immunity.

As noted earlier, the public policy considerations invoked by petitioner in support of her claim of absolute immunity are the very same considerations invoked by the Governor of Ohio and the other state executive officials in *Scheuer*. See p. 10, *supra*. Under *Scheuer* and its progeny, however, such an absolute immunity defense will be recognized only when the public policy considerations supporting such a defense at common law are so overwhelming as to make reasonable the inference that Congress could not have intended to render such a defense unavailable when, in enacting § 1983, the Legislature created a federal cause of action against "every person" who under color of state law deprives another person of federal rights.<sup>4</sup> Petitioner has utterly failed to explain

<sup>4</sup> See, e.g., *Scheuer*, 416 U.S. at 243-45; *Imbler v. Pachtman*, *supra*, 424 U.S. at 434 (White, J. concurring) ("there are certain



why the considerations she identifies should lead to the recognition of absolute immunity in the circumstances of this case when these considerations were held insufficient to warrant such an immunity in *Scheuer*.

Nor is it significant, as petitioner suggests, that the specific actions giving rise to this lawsuit were employment decisions—a species of official action that petitioner regards as especially crucial to the proper functioning of state government. See Pet. Br. at 19. The proposition that such employment decisions by the Auditor General of Pennsylvania were more critical to the State and its citizenry than the decision of the Governor of Ohio to send the National Guard to Kent State University cannot bear inspection. Yet the Court in *Scheuer* held that absolute immunity from suit under § 1983 could not attach to the Governor's decision.

Of at least equal significance, this Court in *Forrester v. White*, *supra*, held that a state judge could be held liable in damages under § 1983 for his non-judicial employment decisions, even if he would enjoy absolute immunity for his judicial decisions. Thus, *Forrester* has laid to rest any possible contention that employment decisions by state officials are somehow unique in entitling the state decisionmaker to absolute immunity from suit under § 1983:

[A] judge who hires or fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys, or indeed from any other Executive Branch official who is responsible for making such employment decisions. Such decisions, like personnel decisions made by judges, are often crucial to the efficient

absolute immunities so firmly rooted in the common law and supported by such strong policy reasons that the Court has been unwilling to infer that Congress meant to abolish them in enacting 42 U.S.C. § 1983"); *Forrester v. White*, *supra*, 484 U.S. at 224, 229-30.

operation of public institutions (some of which are at least as important as the courts), yet no one suggests that they give rise to absolute immunity from liability in damages under § 1983. [484 U.S. at 229.]

Significantly, in asserting a right to absolute immunity from suit under § 1983, petitioner fails even to acknowledge that under *Scheuer* and its progeny she is already entitled to assert a *qualified* immunity defense. The availability of such a qualified immunity defense is more than adequate to address the public policy considerations raised by petitioner to the extent that those considerations have force. The qualified immunity defense available to state executive officials has evolved since *Scheuer* to the point where such officials can be held liable in damages under § 1983 only where their conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known"; and summary judgment prior to discovery is readily available to weed out "insubstantial claims." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).<sup>5</sup> As such, the defense, in the Court's words, "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, *supra*, 475 U.S. at 341.

As this Court has previously found, the recognition of an even greater immunity from suit under § 1983—*viz.*, an absolute immunity—would serve to defeat the complementary congressional goals of deterring constitutional and statutory violations by state officials and compensating the victims of unlawful conduct when deterrence has failed.<sup>6</sup> In this light, petitioner's complaint that state

<sup>5</sup> Although *Harlow* involved claims against federal executive officials under *Bivens v. Six Unknown Fed. Narcotic Agents*, 403 U.S. 388 (1971), and not claims against state executive officers under § 1983, the Court applies the same immunity principles in both contexts. See, e.g., *Harlow*, 457 U.S. at 809, 818 & n.30; *Malley v. Briggs*, *supra*, 475 U.S. at 335 n.2.

<sup>6</sup> See, e.g., *Forrester v. White*, *supra*, 484 U.S. at 223 ("To the extent that the threat of liability [under § 1983] encourages [state] officials to carry out their duties in a lawful and appropriate manner,

executive officers will be compelled "to hesitate" in conducting the affairs of state government if they are not held absolutely immune from damages suits under § 1983, Pet. Br. at 19, is particularly misplaced. As this Court observed in *Harlow, supra*, in fashioning the test for the defense of qualified immunity,

[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, *he should be made to hesitate*; and a person who suffers injury caused by such conduct may have a cause of action. [457 U.S. at 819 (emphasis added).]

### CONCLUSION

For the foregoing reasons the decision of the court below should be affirmed.

Respectfully submitted,

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and to pay their victims when they do not, it accomplishes exactly what it should."); *Gomez v. Toledo, supra*, 446 U.S. at 638-39 (section 1983 "reflects a congressional judgment that a 'damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees'") (quoting *Owens v. City of Independence, supra*, 445 U.S. at 651); *Scheuer, supra*, 416 U.S. at 248 (section 1983 "would be drained of meaning" were the Court to hold that state executive officers are absolutely immune from suit under the statute).

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No. 90-681

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In The  
SUPREME COURT OF THE UNITED STATES  
October Term, 1990

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BARBARA HAFFER,

Petitioner,

against

JAMES C. MELO and CARL GURLEY, et al.,

Respondents.

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Third Circuit

-----  
MOTION FOR LEAVE TO FILE BRIEF AND  
BRIEF OF KENNETH W. FULTZ AS AMICUS  
CURIAE IN SUPPORT OF RESPONDENTS  
-----

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MOTION FOR LEAVE TO FILE BRIEF  
OF KENNETH W. FULTZ AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS

---

Kenneth W. Fultz respectfully moves  
the court, pursuant to Rule 37.4,  
R.S.Ct., for leave to file the  
accompanying brief amicus curiae in  
support of respondents. Respondents have  
consented to the filing of the brief.

Petitioner has refused consent.

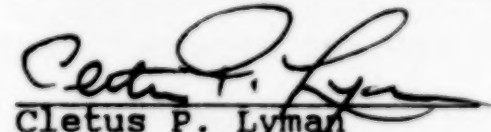
Mr. Fultz is an individual who was terminated from his position as Park Superintendent 4, Bureau of Parks, Department of Environmental Resources, Commonwealth of Pennsylvania, on April 20, 1988. Gregg E. Robertson, Deputy Secretary of Environmental Resources, Commonwealth of Pennsylvania, acting on behalf of Arthur W. Davis, Secretary, made the decision to terminate him, with the participation of William C. Forrey, director of state parks.

On April 19, 1990, Mr. Fultz brought an action seeking back pay and other damages to be paid personally by Messrs. Davis, Forrey and Robertson, under 42 U.S.C., Section 1983. Fultz v. Davis et al., M.D.Pa. Civ. Act. No. 90-0779, appeal pending, 3d Cir. No. 90-6039.

Fultz alleges that he was terminated in violation of due process guaranteed by the Fourteenth Amendment because he was deprived of a pretermination hearing required by Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532 (1985).

Because the Commonwealth is immune from back pay and damages awards under the Eleventh Amendment, Fultz like respondents must look to officials responsible for his termination for compensation. The court's decision here will likely control the outcome of Fultz v. Davis as to back pay and damages.

Respectfully submitted,



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## QUESTIONS PRESENTED

1. Is the Auditor General of Pennsylvania, acting within her official capacity in connection with the discharge of employees, not a "person" under the Civil Rights Act, 42 U.S.C. Section 1983, and therefore not subject to civil damage actions instituted under that statute on behalf of former employees of the Pennsylvania Department of the Auditor General arising out of the Auditor General's termination of their employments?

2. Is not the Auditor General of Pennsylvania, acting within her official capacity in connection with the discharge of employees, entitled to the absolute immunity of the Eleventh Amendment to the Constitution of the United States from civil damage actions in the federal

courts instituted on behalf of former employees of the Pennsylvania Department of Auditor General arising out of the Auditor General's termination of their employments?

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In The  
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No. 90-681

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On Writ Of Certiorari  
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BRIEF OF KENNETH W. FULTZ  
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

---

INTEREST OF THE AMICUS CURIAE

The interest of the amicus is set  
forth in a motion which precedes this  
brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner argues that a footnote in a 1989 decision of this court overrules the seminal case in the area of official liability for deprivation of Constitutional rights.

This court should reaffirm its 17 year old precedent, which is stare decisis and correctly decided. The precedent is part of the fabric of jurisprudence of official immunity, which accords absolute immunity for all official acts to the president of the United States, absolute immunity to certain officials in exercise of certain functions, and qualified immunity to all but the president in administrative functions such as employment decisions.

## ARGUMENT

1. The Auditor General of Pennsylvania, acting within her official capacity in connection with the discharge of employees, is a "person" under the Civil Rights Act, 42 U.S.C. Section 1983, and is subject to civil damage action instituted under the statute on behalf of former employees of the Pennsylvania Department of the Auditor General, arising out of the Auditor General's termination of their employments.

The above question and the question that follows have previously been decided by this court. Scheuer v. Rhodes, 416 U.S. 232 (1974). Certiorari was improvidently granted in this case in that neither the petition for the writ nor the brief in opposition filed by respondents cited Scheuer.

The complaints in Scheuer alleged that the governor of Ohio, the adjutant general of the Ohio National Guard and various other state officials, in deploying the Ohio National Guard on the



Kent State campus, acted either outside the scope of his respective office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful powers of office. 416 U.S. at 235.

Scheuer unanimously held [Douglas, J., taking no part] that state officials were subject to suit under Section 1983 "in their persons."

2. The Auditor General of Pennsylvania, acting within her official capacity in connection with the discharge of employees, is not entitled to the absolute immunity of the Eleventh Amendment to the Constitution of the United States from civil damage actions in the federal courts instituted on behalf of former employees of the Pennsylvania Department of Auditor General arising out of the Auditor General's termination of their employments.

Scheuer, supra, also held that since Ex parte Young, 209 U.S. 123 (1908), it

has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under color of state law. 416 U.S. 237.

Scheuer said that Ex parte Young teaches that, when a state officer acts under a state law in a manner violative of the Federal Constitution, he "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States [the court's emphasis]."

Scheuer held that state officials

are entitled to qualified immunity for official actions. 416 U.S. 247. Such immunity depends on the belief of the official formed at the time and in light of the circumstances. 416 U.S. 247-248.

Official immunity is the same for state and federal officials and school board members. Butz v. Economou, 438 U.S. 478, 506-508 (1978) (federal officials governed by Scheuer); Wood v. Strickland, 420 U.S. 308, 319 (1975) (school board members governed by Scheuer). Only the president of the United States has absolute immunity for all official acts. Nixon v. Fitzgerald, 457 U.S. 731 (1982). Some officials have functional absolute immunity, for examples, judges in their adjudicatory functions, legislators in the legislative functions, and prosecutors in their



prosecutorial functions. Imbler v. Pachtman, 424 U.S. 409, 430 (1976). But, no official other than the president of the United States has absolute immunity in administrative functions.

The function of employer has twice been recognized as the type of administrative function not entitled to absolute immunity. A state judge in his function of employer has only qualified immunity. Forester v. White, 484 U.S. 219 (1988). Likewise, a member of Congress may be sued as an employer. Davis v. Passman, 442 U.S. 228 (1979).

Harlow v. Fitzgerald, 457 U.S. 800 (1982), held that officials entitled to qualified immunity must demonstrate that they did not violate clearly established constitutional rights of which a reasonable person would have known.

Scheuer has been followed and cited with approval through 1990 (after Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989), relied upon by petitioner). Howlett By and Through Howlett v. Rose, - U.S. --, 110 S. Ct. 2430, 2447 (1990); Forester v. White, supra, 484 U.S. at 224; Cleavinger v. Saxner, 474 U.S. 193 (1985); Papasian v. Allen, 478 U.S. 265, 278 (note 11) (1986); Butz, supra, Wood, supra.

This court has also established standards for award of punitive damages against state officials under Section 1983. Smith v. Wade, 461 U.S. 30 (1983).

Petitioner's brief on the merits also fails to cite Scheuer. Had petitioner cited Scheuer, she might have argued either (1) that Scheuer was overruled sub silentio by Will, or, (2)

that the court should overrule Scheuer.

The first argument is improbable in that this court would not overrule the seminal case in the area of official liability in a footnote; the footnote borders on dicta; and, Scheuer was cited as good law in Howlett.

Scheuer should not be overruled now because it was correctly decided, it is stare decisis, officials of federal, state and local governments are treated the same, and Scheuer is essential to remedy constitutional violations. This is particularly true where a state is involved because an individual deprived of a constitutional right by a state official has no damages remedy against the state.

The qualified immunity provided by Scheuer, as elaborated and enhanced in



Harlow, sufficiently safeguards the interest of the state and its officials in avoiding liability for actions taken when constitutional rights are unclear.

Davis, supra, 442 U.S. at 245-249, considered and rejected the policy arguments advanced by petitioner.

Davis held, at 246, that legislators, when not shielded by the Speech or Debate Clause, ought generally to be bound by the law as are ordinary persons. Quoting Butz, supra, the court said:

"Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." United States v. Lee, 106 U.S. [196,] 220 [(1882)].' 438 U.S., at 506."

Davis was cited with approval in Forester, supra, 484 U.S. at 229-230.

Scheuer has been the law for 17 years, and should not be overruled by this court because Congress has not overruled Scheuer by amendment of Section 1983. In 1976, Congress amended Section 1983 by adding a remedy of attorneys fees. Pub. L. 94-559, Section 2, 90 Stat. 2641, 42 U.S.C., Section 1988 (October 19, 1976). The legislative history of the 1976 Amendment evinces a strong Congressional desire for effective remedies for Section 1983 violations. Hutto v. Finney, 437 U.S. 678 (1978).

This court should decline the invitation of petitioner (petition for certiorari, at 12), to use this case to explore "the extent of state officials' immunity" because this case offers no

basis on which to expound qualified immunity beyond the standards of Harlow.

These cases were dismissed by the district court, and so treated by the court of appeals. Accordingly, there was no development of the qualified immunity issue below.

3. The court should not review the question presented by amicus curiae State and Local Legal Center.

State and Local Legal Center moves to raise a pleading question, whether a government official may be sued for damages when the compliant fails to identify the capacity, official or personal, in which the official is sued.

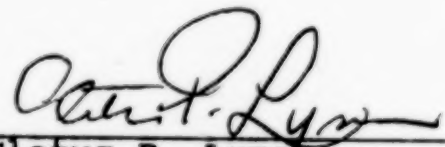
Review of this issue should be denied because the court did not grant review of it. Moreover, the issue is academic in a case against state



officials because state officials cannot be sued for damages in their official capacities. Accordingly, any claim for damages must be construed as seeking damages against them personally.

Conclusion

WHEREFORE, the grant of certiorari should be vacated as improvident and the petition for a writ of certiorari should be denied, or, in the alternative, the judgment of the court of appeals should be affirmed.

  
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